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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1963

No. 223

SAMUEL JOSEPH RUGENDORF, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 21, 1963

CERTIORARI GRANTED OCTOBER 24, 1963

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In the

United States Court of Appeals

For the Seventh Circuit

No. 13967

UNITED STATES OF AMERICA, *Appellee,* vs. SAMUEL JOSEPH RUGENDORF, *Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. Honorable J. Sam Perry, Judge Presiding.

Appendix for Appellant

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Appellant's Appendix

1-2 Prefix to Record.

3-4 Indictment as follows:

The April 1962 Grand Jury charges:

That on or about March 22, 1962 at Chicago, Illinois, in the Northern District of Illinois, Eastern Division,

SAMUEL JOSEPH RUGENDORF,

defendant herein, did unlawfully receive, conceal and store certain stolen goods, wares and merchandise, to wit:

81 FUR PIECES

of a value in excess of Five Thousand Dollars ($5,000.00), moving as, a part of, and constituting interstate commerce, to wit, from Shreveport, Louisiana and Mountain Brook, Alabama, to Chicago, Illinois, the said defendant then and there well knowing the same to have been stolen; in violation of Section 2315, Title 18, United States Code.

5 Arraignment and plea of not guilty.

6-8 Petition to quash the search warrant and to suppress the evidence as follows:

Your petitioner, Sam Rugendorf, respectfully states that he is the defendant herein. Your petitioner further shows that on to-wit March 22, 1962, certain agents of the Federal Bureau of Investigation, acting under color of authority of a pretended search warrant issued on March 22, 1962 by C. S. Bentley Pike, United States Commissioner for the Northern District of Illinois, Eastern Division, executed a search warrant on the residence at 3117 West

Jarvis Avenue, Chicago, Illinois, and took from the said house a certain number of furs mentioned in the indictment herein; and that the evidence thus obtained by the said illegal search and seizure constituted the basis for the indictment herein against your petitioner.

Your petitioner attaches hereto and makes a part
7 hereof true and certified copies of the affidavit for search warrant, the search warrant, and the return to said search warrant.

Your petitioner further shows that the search and seizure of the said items of furs as above described at the premises at 3117 West Jarvis Avenue, Chicago, Illinois, were illegal and unlawful and void in violation of the Fourth and Fifth Amendments to the Constitution of the United States and the Statutes and Laws of the United States for the following reasons:

1. That the affidavit for the search warrant is false and untrue.

2. That the said affidavit for search warrant is insufficient in law to establish probable cause for the issuance of a search warrant.

3. That the affidavit states no facts sufficient to establish probable cause justifying the issuance of a search warrant.

4. That the search warrant herein was issued on the basis of an insufficient affidavit for such search warrant and solely upon the belief of the affiant who made said affidavit upon certain unsupported hearsay.

Your petitioner further shows that the United States
8 Attorney intends to use the evidence so unlawfully seized against your petitioner in the trial of this cause unless an order is entered herein quashing said search warrant and suppressing the evidence obtained by said unlawful search and seizure.

Wherefore, your petitioner prays that an order may be entered herein suppressing the evidence obtained by said unlawful search and seizure and all clues derived therefrom and excluding said evidence at the trial and hearing of this cause.

Sam Rugendorf
Sam Rugendorf, Petitioner

State of Illinois,
County of Cook—SS.

Sam Rugendorf, being first duly sworn on oath, deposes and says that he has read the above and foregoing petition by him subscribed, that the matters contained therein are true and correct.

Sam Rugendorf
Sam Rugendorf

Subscribed and sworn to
before me this 4th day
of June, 1962.
Avrum Dannen

Notary Public

9-12 Search warrant, the return and the affidavit for search warrant.

UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

Commissioner's Docket No. 18—Case No. 9037

UNITED STATES OF AMERICA

v.

BASEMENT OF SINGLE FAMILY RESIDENCE AT 3117 WEST JARVIS AVENUE, CHICAGO, ILLINOIS.

SEARCH WARRANT

To Any Special Agent of the Federal Bureau of Investigation.

Affidavit having been made before me by MARLIN H. MOORE, that he (has reason to believe) that (on the premises known as) the Basement of a Single Family Residence, located at 3117 West Jarvis Avenue, Chicago, Illinois, in the Northern District of Illinois, there is now being concealed certain property, namely approximately 80 fur garments of a value of approximately $40,000.00, which are the proceeds of a burglary which took place in MOUNTAIN BROOK, ALABAMA, on February 10, 1962, and which garments were transported thereafter from MOUNTAIN BROOK, ALABAMA, to CHICAGO ILLINOIS, and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the (premises) above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the (place) named for the property specified, serving this warrant and making the search (in the daytime) and if the property be found there to seize it, leaving a copy of this

warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date as required by law.

Dated this 22nd, day of March, 1962.

(SEAL) *C. S. Bentley Pike,*
U. S. Commissioner.

RETURN

I received the attached search warrant 3-22, 1962, and have executed it as follows:

On 3-22, 1962 at 5:00 o'clock P.M., I searched (the premises) described in the warrant and

I left a copy of the warrant with *Belle Rugendorf* together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

59 Fur stoles
4 Bolero length Fur Jackets
18 Fur Jackets

This inventory was made in the presence of *W. J. McCormick, R. L. Malone* and *Belle Rugendorf.*

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

Marlin Moore
Special Agent FBI

Subscribed and sworn to and returned before me this 23 day of March, 1962.

C. S. Bentley Pike
United States Commissioner

UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

Commissioner's Docket No. 18—Case No. 9037

UNITED STATES OF AMERICA

v.

BASEMENT OF SINGLE FAMILY RESIDENCE AT 3117 WEST JARVIS AVENUE, CHICAGO, ILLINOIS.

AFFIDAVIT FOR SEARCH WARRANT

Before C. S. Bentley Pike, Chicago, Illinois

The undersigned being duly sworn deposes and says:

That he (has reason to believe) that (on the premises known as) the basement of a single family residence located at 3117 W. Jarvis Avenue, Chicago, Illinois, in the Northern District of Illinois, there is now being concealed certain property, namely approximately 80 fur garments, being stoles and jackets of a value of approximately $40,000.00, which fur garments were taken in a burglary in MOUNTAIN BROOK, ALABAMA, on February 10, 1962, which are goods of a value in excess of $5,000.00, which had been stolen in MOUNTAIN BROOK, ALABAMA, on or about February 10, 1962, and thereafter transported in interstate commerce to Chicago, Illinois.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

That this affiant is in receipt of a communication from Special Agent L. Dean Paarmann of the Birmingham, Alabama, Office of the Federal Bureau of Investigation, stating that on February 10, 1962, a burglary took place in MOUNTAIN BROOK, ALABAMA, in which 82 fur garments of a value of approximately $42,044.00 were stolen. This affiant further states that there is contained in said communication a description of said fur garments

and that said fur garments consist of mink, otter, and beaver stoles and jackets (the majority of which garments were mink), and containing no full length coats.

(Continued on attached sheet)

(SEAL) *Marlin Moore*
Signature of Affiant
Special Agent, Fed. Bureau Invest.
Official Title, if any.

Sworn to before me, and subscribed in my presence, March 22, 1962.

C. S. Bentley Pike,
United States Commissioner.

This affiant further states that Special Agent W. J. McCORMICK of the Federal Bureau of Investigation told this affiant that a confidential informant who has furnished reliable information to the Federal Bureau of Investigation in the past told McCORMICK that FRANK SCHWEIHS of Chicago, Illinois, with others, committed the fur burglary in Alabama, and, further, that McCORMICK told the affiant that on approximately March 1, 1962, Chicago Police Officer JAMES KELLEHER told McCORMICK that he saw FRANK SCHWEIHS at RUGGENDORF BROTHERS MEAT MARKET, managed by SAMUEL RUGGENDORF, at 2449 South Wentworth Avenue, Chicago, Illinois; further, Agent McCORMICK advised this affiant that another confidential informant who has furnished reliable information to the Federal Bureau of Investigation in the past told McCORMICK that LEO RUGGENDORF was a fence for FRANK SCHWEIHS; that SAMUEL RUGGENDORF was LEO RUGGENDORF'S brother and was associated in the meat business with his brother.

This affiant further states that he was told by Special Agent J. J. OITZINGER of the Federal Bureau of Investigation that a confidential informant who has furnished reliable information to the Federal Bureau of Investigation in the past told OITZINGER that FRANK SCHWEIHS, TONY PANZICA, and MIKE CONDIC were accomplished burglars who disposed of the proceeds of their burglaries through LEO RUGGENDORF.

This affiant further states that a confidential informant who has furnished reliable information in the past to the Federal Bureau of Investigation told this affiant, on March 16, 1962, that he saw approximately 75 to 80 fur garments in the basement of the home of SAMUEL RUGGENDORF at 3117 West Jarvis Avenue, Chicago, Illinois, within the past week and described these fur garments as mink, otter, and beaver jackets and stoles, the most of which were mink; and that the labels had been removed from said fur garments; further, that there were no full length coats, and that the informant had been told the furs were stolen.

This affiant further states that a description of all furs taken in burglaries and robberies in the United States, exceeding $5,000.00 in total value, is furnished to the Federal Bureau of Investigation, and that he has reviewed the description of all fur garment merchandise taken in said burglaries in the past six months, and that the only burglary totaling over $5,000.00 in the United States, reported to the Federal Bureau of Investigation, containing a similar description of the furs described by the informant, is the burglary that took place on February 10, 1962, at MOUNTAIN BROOK, ALABAMA.

13 Certification by Clerk of Court with respect to the search warrant.

14-23 Government's answer to motion to quash the search warrant and suppress the evidence, stating that:

1. The petition should be stricken because the petition is verified by the defendant.

2, 3, 4, 5, 6 and 7, all denying the allegations of the petition of the search warrant.

8. The government denied that defendant had any standing to maintain the petition to quash the warrant.

24 The court ordered the hearing on the motion to suppress to be taken with the case.

25 Motion for an acquittal at the close of the government's case as follows:

MOTION FOR ACQUITTAL AT THE CLOSE OF THE GOVERNMENT'S CASE.

Comes now the defendant and respectfully moves the court to direct the jury to return a verdict of acquittal at the close of the government's case and states his reasons as follows:

1. The government has failed to prove a prima facie case.

2. The government has failed to prove exclusive personal possession of the goods in the defendant.

3. The government failed to prove the defendant possessed the goods knowing the same to have been stolen.

4. The government failed to prove that the goods in question were continuously, to the time of discovery, moving as or part of inter-state commerce.

26 Motion to suppress the evidence denied.

27 Motion for acquittal at the close of all the evidence as follows:

MOTION FOR ACQUITTAL AT THE CLOSE OF ALL THE EVIDENCE

Comes now the defendant and respectfully moves the court to direct the jury to return a verdict of acquittal at the close of all the evidence, and states:

1. The government has failed to prove exclusive personal possession of the goods in the defendant.

2. The government failed to prove the defendant possessed the goods knowing the same to have been stolen.

3. The government failed to prove that the goods in question were continuously, to the time of discovery, moving as or part of interstate commerce.

4. Defendant was not proved guilty beyond a reasonable doubt.

28-30 Verdict of the jury finding the defendant guilty.

31-34 Motion for a new trial as follows:

IN THE UNITED STATES DISTRICT COURT
* * (Caption—No. 62 CR 202) * *

1. That the evidence is insufficient to support the verdict of the jury.

2. The court erred in refusing to permit the jury to read evidence admitted by the court. During the course of the trial, the Assistant United States Attorney, in his cross examination of the defendant, unfairly suggested to the jury by the tenor of his questions, that the defendant had read questions which were put to him by his counsel, and had read the answers from sheets of paper which defense counsel was holding. Defendant denied this accusation and on redirect examination, the document referred to by the Assistant United States Attorney was marked as an exhibit and offered into evidence.

117 FBI AGENT MARLIN MOORE, called on behalf of the defendant, testified:

Direct Examination.

He was the agent in charge of the case and was assisting the prosecutor. On March 16, 1962, he had a conversation with a confidential informant who gave him certain information.

"Q. Where did you have this conversation with
118 this confidential informant?

Mr. Berg (prosecutor): I am going to object to that question Your Honor."

119 The prosecutor stated his ground for the objection that the government could not reveal the name of the informant because it would cause a possible murder. The court sustained the objection.

"(By Mr. Echeles): Q. Well, wherever it was—by the way, what is the name of this man?

Mr. Berg: Objection, same reason.

The Court: Sustained.

(By Mr. Echeles) Where is he now?

Mr. Berg: Objection.

The Court: Sustained.

Q. Well, you say you talked to him on March—
120 your affidavit states that you talked to him on March 16, 1962. Is that correct?

A. Yes.

Q. On what day did he say he saw the furs in the basement of the home of Sam Rugendorf?

Mr. Berg: Objection, same reason.

The Court: Objection sustained.

Mr. Echeles: If the Court please, I may call to the Court's attention the affidavit signed by Agent Moore, the third paragraph thereof, which states as follows, I quote:

"This affiant," meaning Mr. Moore, "further states that a confidential informant who has fur-

Such exhibit was received in evidence without objection by the government. Yet, when the exhibits were gathered to be sent to the jury room, upon motion of the government, the court refused to send such exhibit to the jury room and by such means, the court denied the defendant his right to have the jury look at evidence which was admitted by the court and was material and relevant to the issue of whether or not the defendant was telling the truth.

3. The court erred in changing its mind in refusing to permit the results of a polygraph examination to be considered by the jury. When the defendant was being cross examined by the government, he was challenged by the government to take a lie detector test. The defendant accepted the challenge and it was stipulated between government counsel and defense counsel that the results of the lie detector test be submitted to the jury along with all the other evidence in the case. On Tuesday, July 3, 1962, the court agreed that such test would be held and by further stipulation, the Leonard Keeler Institute was agreed as the organization to do the testing. Notwithstanding this stipulation, and notwithstanding the court's agreement to such stipulation and the court's announcing to the jury that the defendant would be subjected to a polygraph examination and the result of such test be read to the jury, on the next court day, July 5, 1962, the court announced to the jury that it would not permit the defendant to take a lie test because it had never been done before. We respectfully submit that the court was in error and that by this means, the defendant was irremediably prejudiced in the eyes of the jury.

4. The court erred in refusing to admit evidence offered by the defendant in that the court refused to permit any reference to the search warrant, the affidavit for the search warrant and refused to permit the search warrant and the affidavit in support of the search warrant to be received into evidence when the defendant made such an offer.

nished reliable information in the past to the Federal Bureau of Investigation told this affiant on March 16, 1962 that he saw approximately 75 to 80 fur garments in the basement of the home of Samuel Rugendorf—"

The Court: He told him on that day, but he didn't say on what date he saw it.

Mr. Echeles: Yes, your Honor, he didn't. But may I finish?

The Court: Yes.

121 Mr. Echeles: (Reading)

"—that he saw approximately 75 to 80 fur garments in the basement of the home of Samuel Rugendorf at 3117 West Jarvis Avenue, Chicago, Illinois, within the past week."

Then it goes on. If the Court please, you see, I am defending Sam Rugendorf. Now, within the past week from March 16 takes in to March 15, March 13, March 12, March 11, March 10 and March 9. I have got to account, I suppose for the activities of Sam Rugendorf on every day. It would be a lot better, it would accord with fundamental fairness for us to know when it is this informant said he saw it, so I can account for the activities of Sam Rugendorf on the day the confidential informant says he saw it there.

The Court: If the Government ever offers that confindential informant as a witness, you will be certainly fully informed.

122 Mr. Echeles: But they haven't—

The Court: At the present time the Government has stated that they will not use that confidential informant as a witness.

Mr. Echeles: I understand, but I need that information to defend my defendant, your Honor.

5. The court erred in its charge to the jury.

6. The court erred in declining to charge the jury as requested by the defendant.

7. The defendant was deprived of a fair trial by the reason of the improper acts of the prosecuting attorney and by reason of his unfair and inflammatory address to the jury over the objection of the defendant.

8. The court erred in admitting into evidence the 81 fur pieces, which evidence should have been suppressed.

9. The court erred in overruling the defendant's motion for the government to reveal the names of the informers when such information was necessary to the constitutional rights of the defendant in pursuing his motion to suppress the evidence.

10. The defendant was deprived of a fair trial in accordance with due process of law when the government prosecutor asserted in front of the jury as to what the contents of the affidavit for the search warrant was without the affidavit being allowed into evidence.

11. The court erred in disparaging defense counsel in front of the jury, thus depriving the defendant of his constitutional right to effective representation during the trial.

12. The court erred in referring to the right of the defendant to appeal in front of the jury during the course of the trial. Such comments by the court delimited the responsibility of the jury as the final arbiters of the facts.

37-38A Defendant's motion for a new trial and for probation were denied and defendant was sentenced to the custody of the Attorney General for a period of ten years under Section 4208(a)(1), Title 18, U. S. Code with the defendant to serve a minimum of two years.

38-39 Notice of appeal and certificate of mailing.

40 Statement pursuant to Rule 12(d).

41-42 Stipulation in accordance with Rule 12(e).

43-45 Motion to extend the time within which to file the record allowed.

46 Amendment to stipulation in accordance with Rule 12(e).

1-8 Colloquy.

TRANSCRIPT OF PROCEEDINGS

9-18 In advance of the prosecution presenting any evidence, the defendant made a demand upon the Government for the names of the informers as set out in the affidavit in support of the search warrant. The defense requested the names of the informants.

"Mr. Echeles: Roviera *v.* U. S., which is cited by our Seventh Circuit as authority for this proposition, states that if the informants, if the names of the informants are necessary to a proper defense of a proper presentation of the defendant's case in attacking the search warrant, then in the interest of justice it must be given to the defendant. The Government has no reason not to give it, said Roviera, and that is the controlling law.

Let me demonstrate how in our opinion the names of the informants are necessary.

I state to the Court that we will show, and I make it as an assertion to this Court, I propose to demonstrate by evidence that in the affidavit in support of the search warrants, on page 2 thereof, there are certain factual errors. These facts, if they came from an informer, are false facts, so maybe they did not come from an informer, or, if they came from an informer then we are entitled now to cross examine the informer. Maybe he did not give the information, if the confidential informer is so wrong about the facts.

They state that Sam Rugendorf was the manager of Rugendorf Brothers Meat Company. Sam Rugendorf was not the manager of Rugendorf Brothers Meat Company. He has not been associated with Rugendorf Brothers Meat Company for ten years, from 1952 to and including 1962, and we will demonstrate it by adequate proof.

It states here that an informer, a confidential informer, gave them reliable information, that Sam Rugendorf was Leo Rugendorf's brother—that part is true, your Honor; and was associated in the meat business with his brother. That is false, your Honor, and we will demonstrate it.

And so we are entitled, under Roviera, under Pierce, under Conforti, which comes from the Seventh Circuit also, to the names of the informants so that we may either seek out the informants ourselves and call them to the witness stand or perhaps the Government, to aid this Court to decide this important question, should call them himself.

They say, to get their search warrant, that a confidential informant who has furnished reliable information in the past to the Federal Bureau of Investigation told this affiant, Mr. Moore, who made the affidavit, told them on March 16, 1962 that he saw approximately 75 to 80 fur garments in the basement of the home of Samuel Rugendorf at 3117 West Jarvis, Chicago, Illinois, within the past week, that is, within the week prior to March 16.

I would suggest that not only is this informant necessary to the defendant because if he takes the stand it will demonstrate that Sam Rugendorf had nothing to do with it, or possibly his falsity, but I would suggest that perhaps he would be a pretty good witness for the Government, that they ought not to want to hide the witness, that he would pretty much make out a case for the Government.

In any event, your Honor, I rely upon United States *v.* Pierce, 275 F. 2d, our Circuit. I rely upon Roviera *v.* United States, 353 U.S. 53. And I rely upon Giordinella *v.* United States, 357 U.S. 480, as being the proper procedure that I am trying to get here, your Honor."

hibit 3 showed the side entrance of the house; Exhibit 4, the side door close up; Exhibit 5, the side entrance going down into the basement showing the stairway leading down to the basement; Exhibit 6 showing the door right alongside the stairs going into the basement; Exhibit 7 showing the same view with the door open showing a pantry; Exhibits 8 and 9 are pictures of the basement taken on July 1, 1962; Exhibit 10 showed the closets on the left in the basement, being the extreme north end and a closet on the right side—the closets being in the wall which is on the north side of the house; Exhibit 12 showing the closet doors open.

Defendant's Exhibits 1 through 12 were admitted into evidence.

158-162 ALBERT ABRAMSON testified:

Direct Examination.

He had been an insurance broker for 44 years and knew the defendant for about 33 years. The reputation of the defendant for truth and veracity, for honesty and fair dealing was the finest.

163-170 NATHAN ROSKIN testified:

Direct Examination.

He lived at 3105 W. Jarvis, was a pharmacist since 1932 and owned a drug store. He knew the defendant for the past 8 years as a neighbor. The defendant's reputation amongst his friends and relatives for truth and veracity and for fair dealing was very fine. In February, 1962, he had a key to the home of Belle and Sam Rugen-

dorf and they had a key to his home. The reason for this was that when the Rugendorffs left town to visit their daughter in Canada the witness would watch the house and when the witness left the city, Mrs. Rugendorf would watch the house and feed his dog. He knew that Belle and Sam Rugendorf were on a vacation in February, 1962.

168-170 *Cross Examination.*

The witness stated that during the time he had the key he did not place any furs in the basement nor did he permit any other person to have the key.

170-174 LAWRENCE WEINER, Certified Public Accountant for 12 years, testified:

Direct Examination.

He knew the defendant for about 10 or 12 years and that he knew the reputation of the defendant for truth and veracity and for honesty and fair dealing was very good. He also knew that the reputation the defendant bore with the bank officials with whom the defendant dealt was very high. The witness also prepared the defendant's income tax returns of the business in the 3900 block south Wallace under the name of Wallace Foods. The defendant was in partnership with his wife Belle and his son Jerry. The witness had prepared defendant's Exhibits 13, 14, 15 and 16, marked for identification.

174-177 *Cross Examination.*

The witness stated he knew several of the defendant's neighbors and met a number of the neighbors in the defendant's home.

20-22 The government objected to the furnishing of the names of the informers, stating, "... that if the government is to reveal the name of any informants they might and probably would be killed." (R. 22).

22-24 Defense counsel stated that in such event that the government had no alternative but to dismiss the case.

26 The court denied the motion and refused to require the government to reveal the names of those informers whom it would not use as witnesses.

28-43 It was stipulated that Exhibits 1 through 21 and 59 were furs stolen from a fur store in Shreveport, Louisiana on December 4 and 5, 1961; that Government Exhibits 22 through 81, except Exhibit 59, were furs stolen from a fur store in Mountain Brook, Alabama on February 10, 1962; and that the value of the furs was in excess of $5,000.00.

44-46 Colloquy.

47-58 FBI AGENT MARLIN MOORE testified:

Direct Examination.

The defendant resided at 3117 West Jarvis, Chicago, a two story brick single family dwelling, with a basement. On March 22, 1962, at about 5:00 P.M., together with FBI agents William McCormick and Robert Malon, he served a search warrant upon Mrs. Rugendorf. They went to the basement recreation room. The stairway went down on the northeast corner of the building, off the east wall, which goes into the recreation room. In the basement there was a wall running east and west through the center of the building. The back or south end of the room had two smaller rooms, one of which was a laundry and furnace room and then there was a general storage area room, shelves with storage space. Along

the east wall there was a business type desk with a telephone and in about the center of the room there was a card table and sewing machine. There were closets built into the north wall, and in the northwest corner of the basement, there were three large white bags on the floor in a pile. There were also two or three filled laundry bags with unwashed laundry hanging on the east wall. When he went into the basement he went directly to the furnace area and other storage room and looked there briefly; then came back into the recreation room. He saw agent McCormick open the doors of the closets on the north wall. In the last closet he opened there were furs, being Government Exhibits 1 through 81. The furs were hanging on individual wire hangers on a rod that went the length of the closet. They made an inventory and placed such inventory on the back of the search warrant and gave a copy to Mrs. Rugendorf. There were 82 furs in the closet and Mrs. Rugendorf identified one of the furs as her garment. They put the furs in the white bags which he saw on the floor. Three white bags were identified as Government Exhibits 82 through 85. One of the bags, Exhibit 83 was a laundry bag which Mrs. Rugendorf said that he could use and Mrs. Rugendorf emptied the dirty laundry from the bag.

59-75 *Cross Examination.*

Agent Moore testified that the defendant was not at 3117 West Jarvis when he entered. The defendant was in his store on 30th and South Wallace Streets. In one of the closets in which Agent McCormick looked, there were some jars, canned goods and bottles. Defendant's Exhibits 1 through 11 are pictures of the house from the outside showing the east entrance and various pictures of the basement and the closets. When he was in the basement, the closet door was closed and standing in the base-

ment he could not see any furs. Mr. and Mrs. Rugendorf were joint owners of the home. When he served the warrant on Mrs. Rugendorf and discovered the furs in her home, he did not arrest her. However, on March 23, 1962, one day later, she was escorted by FBI agents to the United States Attorney's office at the request of Mr. Monahan, an Assistant United States Attorney.

75 The Government offered into evidence, Exhibits 1 through 85. Defense objected for the reasons previously set out.

The court stated: "Overruled, admitted. They are admitted as evidence as one link in the chain."

76 Defense objected on the ground that the furs were obtained illegally and that a motion to quash the warrant had been filed but that no hearing was held thereon.

77-78 The court vacated its order admitting the exhibits into evidence.

HEARING ON THE MOTION TO SUPPRESS THE EVIDENCE.

78-80 JAMES KELLEHER, testified on behalf of the defendant:

Direct Examination.

That he was a police officer and in March, 1962, was assigned to the State's Attorney's office. On about March 1, 1962, he talked with FBI Agent McCormick and told McCormick that he saw one Frank Schweihs at Rugendorf Brothers Meat Market at 2449 South Wentworth Avenue. In that conversation he did not tell Agent McCormick that the Rugendorf Meat Market was managed by Sam Rugendorf.

81-82 JOHN J. OITZINGER testified on behalf of the defendant:

Direct Examination.

That he was an FBI Agent, that some time in March, 1962, he talked with FBI Agent Marlin Moore and that he brought up the names of Leo Rugendorf, Frank Schweihs, Tonly Panzica, and Mike Condic. In that conversation he told agent Moore that a confidential informant advised him that Schweihs, Panzica and Condic were accomplished burglars who disposed of the proceeds of their burglaries through Leo Rugendorf. At no time did he tell Agent Moore that Sam Rugendorf was in any way a fence.

82-83 "Mr. Echeles: If the court please, the defendant and the defendant's lawyer are now in a little difficulty in calling to the stand special agent W. J. McCormick, because yesterday I was advised by Mr. Berg that Agent McCormick is in a hospital having an operation, and I would have to inquire from Agent McCormick, you see, because the affidavit, if I may briefly explain my position, the affidavit says that McCormick told Moore that officer Kelleher told McCormick that Sam Rugendorf managed Rugendorf Bros. Meat Market. But officer Kelleher said he never said to McCormick any such thing.

"So, of course, I would want to know where he got that bit of falsity, as I will demonstrate to Your Honor's satisfaction that that information in the affidavit for the search is completely false."

SAM RUGENDORF, defendant, testified in his own behalf:

Direct Examination.

85-88 The defendant testified on his own behalf that he was a grocer and meatman and his store was located at 3758 South Wallace Street in Chicago. He was part-

194-195 JAMES KELLEHER, testified as follows:

Direct Examination.

That he was a Chicago police officer assigned to the State's Attorney's office. In connection with the stolen furs, he cooperated with members of the FBI in the investigation. He knew one Leo Rugendorf to be a receiver of stolen property. He knew nothing about Sam Rugendorf in connection with any illegal activities.

Cross Examination.

He stated he saw Sam Rugendorf in the company of Leo on numerous occasions in the past year around Twin Foods in the 3200 block on South Wentworth Avenue.

196-220 MRS. BELLE RUGENDORF, testified as follows:

Direct Examination.

She was the wife of the defendant and had been married for 32 years. She and her husband bought the home at 3117 West Jarvis and lived there for 10 years. Defendant's Exhibit 18 was the deed to the house showing that she and the defendant owned the house in joint tenancy.

On the evening on February 17, 1962, the defendant and she went to Miami, Florida by way of the Eastern Air Lines. They had made the reservation for the trip a week in advance. They were gone from Chicago for fourteen days and returned on March 4, 1962. During the time they were away her son Jerome had a key to her home, also her sister-in-law, Mrs. Rose Siegel, her brother-in-law, Leo Rugendorf, and Mr. Roskin. The reason they had the keys was to check the house, water the plants and take the mail in from the mail box. Her home consisted of three rooms on the first floor, being a parlor, dining

ners there with his wife, Belle, and his son, Jerome. Leo Rugendorf was not associated with him in the management, ownership or operation of that business. He had nothing to do with Rugendorf Bros. Meat Company, located at 2350 South Wentworth Avenue in Chicago. He neither managed it, worked there, nor drew a salary. Neither was he an officer of or a stockholder in the corporation. He had his grocery business on Wallace Avenue for around five years commencing in about April 1, 1957. Prior to that for five years back to 1952 he was not employed. Ten or eleven years prior he did have something to do with Rugendorf Bros. Meat Market. But from about 1952 he had nothing to do in the way of working for or being employed by or managing the Rugendorf Bros. Meat Market.

88-94 *Cross Examination.*

The defendant stated that in the last eight years he had not been to the Rugendorf Bros. Meat Market at 2350 South Wentworth. At one time he was the owner of Rugendorf Bros. Meat Market at 3500 Wentworth Avenue and at 3503 Wentworth Avenue. The Rugendorf Bros. Meat Market moved to 2350 South Wentworth Avenue about five or six years prior. He owned a Ford station wagon and a Ford Galaxie. His son, Jerome, who worked with him at the grocery store at 3758 South Wallace Street, sometimes went to Rugendorf Bros. Meat Market. Whenever the witness was short of a certain item of meat Jerome would run over to the Rugendorf Bros. Meat Market and pick up the meat. He himself has never been at the Rugendorf Bros. Meat Market.

95 *Redirect Examination.*

The defendant stated that whether the Rugendorf Bros. Meat Market was at 2440 South Wentworth Avenue or 2350 South Wentworth Avenue he has been to neither address in the last four years.

room and kitchen. The second floor had three bedrooms and a bathroom. The basement was partitioned in two sections. The rear—to the west of the house, was a laundry room; and the rest of the basement was finished as a recreation room with three closets. The photograph, defendant's exhibit 5, portrayed the open side door and the stairs going down to the recreation room. There was an entrance from the outside on the east side of the house going down the stairs into the basement.

She was home when Agent Moore and two other FBI Agents served a search warrant on March 22, 1962, and she saw the agents search the basement. She saw them open one of the closet doors and find a group of furs. About three days before February 17, 1962, she looked in that closet and took out of it two yellow jackets to pack for her husband. At that time the furs found on March 22nd were not there. The only fur there was a Persian lamb coat which belonged to her sister-in-law, Mrs. Jean Witt. She did not again, before she left Chicago, look in the closet. When she returned to Chicago on March 4, 1962, she had no occasion to go into the closet, nor did she look in the closet at any time between the time she returned on March 4, 1962 and March 22, 1962. The closet had a closed door. There were two other closets in the basement, the closet adjacent to the closet where the furs were found has black steel shelves, and on the shelves were gallon jars for pickling and camera equipment. She had no occasion to go into that closet between March 4 and March 22. There was a third closet in the basement adjacent to the stairway in which was kept glassware, some grocery supplies and liquor. She also had a laundry chute and the laundry and linens went down into that closet. Between March 4 and March 22, 1962, she had occasion to go into that closet to take out dog food and

96 The court inquired whether the defendant had any social relationships with his brother Leo and the defendant stated he did not.

96-97 *Recross Examination.*

The defendant stated he did not know whether the Rugendorf Bros. Meat Market was at 2449 South Wentworth Avenue or 2350 South Wentworth.

97 *Redirect Examination.*

The defendant stated that whether the Rugendorf Bros. Meat Market is at either address he has not been there.

98-99 CLARENCE CRAMSIE testified for the defendant:

Direct Examination.

That he was employed by the Rugendorf Bros. Inc. Meats at 2449 Wentworth Avenue. He had worked at that address for about twenty years; but the Rugendorf Bros. Meat Company bought the place about four years prior. He is a retail butcher there and the place has three employees. It is managed by Max Siegel. He has never seen the defendant Sam Rugendorf at his place of business, the Rugendorf Bros. Meat Market. To his knowledge the defendant had never been in the place.

100-109 *Cross Examination.*

That defendant's son, Jerome would come to the meat market at 2449 South Wentworth Avenue to get something, perhaps once a month when he ran short of something. He never met the defendant, but he saw the defendant go into the barber shop near where he worked and the defendant was pointed out to him by one of the other employees. Prior to four years ago when the Rugendorf Bros. Meat Market took over the business of the Charles Meat Company at 2449 South Wentworth Avenue, the Rugendorf

Bros. Meat Market was located at 35th and Wentworth Streets. The owner of Rugendorf Bros. Meat Market was Max Siegel. Leo Rugendorf was a salesman. Max Siegel was on the job all the time. Leo Rugendorf was a salesman who went out to get orders selling meat at retail and wholesale. He has seen Leo Rugendorf at the store.

110-112 MAX SIEGEL testified for the defendant:

Direct Examination.

That he was associated with the Rugendorf Bros. Incorporated, a meat business, from 1948 continuously. The Rugendorf Bros. Inc. Meat Market was located at 2449 South Wentworth Avenue. Before then, about four years prior, the address was 3503 South Wentworth. He was the defendant's brother in law. He was the general manager of Rugendorf Bros. Meat Market. Sam Rugendorf, the defendant, was not connected with Rugendorf Bros. Meat Market at any time since he was there.

112-116 *Cross Examination.*

The witness said that he and his wife owned stock in the corporation; that Sam Rugendorf had no stock in it. Jerome Rugendorf, his nephew, came to the store sometimes once in two weeks, sometimes once in a week when he needed some meat. Before Rugendorf Bros. Inc. moved from 3505 South Wentworth to 2449 South Wentworth, Sam Rugendorf owned no stock. Sam Rugendorf had nothing to do with the store at 3505 South Wentworth. He saw Leo Rugendorf very often, most every day. The defendant Sam Rugendorf has never been to the store at 2449 Wentworth. He has never seen Sam together with Leo at the store. He did see them on a holiday.

Mr. Berg: I object, your Honor, on the basis of the arguments that I advanced before.

Mr. Echeles: Respectfully, your Honor, *United States* v. *Roviera* suggests to the Court that we are entitled to some information about this so-called confidential informant, and even if the Court denies my motion that we be given his name, denies the motion about where the conversation took place, can we at least not have the date on when it took place so Sam Rugendorf can defend himself?

I am demonstrating to this Court, I hope successfully, that other information, factual information, so-called,
123 asserted by Agent Moore in his affidavit is false, and if given an opportunity, I will demonstrate to the Court beyond peradventure of a doubt that other information here is false, because if the FBI cloaks itself in an affidavit under oath by saying that "We have confidential information about a matter" and I prove to this Court that some of that information is false, then how does the defendant defend himself when we want to show that other information is false?

124-128 Argument of counsel.

128 "Mr. Echeles: . . . but I ask the court to let me go
129 into the facts as set out in the affidavit and to go behind the affidavit, as we are permitted in *United States* v. *Pierce*." The court foreclosed further questioning of the witness and sustained the objection of the government.

"Mr. Echeles: Well, if the court is foreclosing me from—

The Court: I certainly am. I have said it several times, counsel."

130-132 In arguing the insufficiency of the affidavit in the search warrant the following colloquy occurred:

"Mr. Echeles: If the court please, in two paragraphs here they have got—here is one place where it is false.

I put Officer James Kelleher on the witness stand to ask him whether or not he told Agent McCormick that Sam Rugendorf managed the Rugendorf Bros. Meat Market. Officer Kelleher said he did not tell McCormick that. Yet Agent Moore makes an affidavit that Agent McCormick told him, Moore, that Officer Kelleher told McCormick that Sam managed the meat market. I have demonstrated the falsity of it Your Honor.

The Court: Even if part of the affidavit should be false, the main part of it, the material part, is true, because they actually found the garments there. Bring the jury.

Mr. Echeles: But the court doesn't let me inquire into that part of as to which the court believes it to be true.

The Court: It is is unnecessary to go further into the matter." (R. 132)

The court received exhibits 1 through 85 into evidence.

133 Whereupon the government rested its case.

The court denied the motion to suppress the evidence.

133-134 Whereupon the defendant presented his motion for acquittal at the close of the government's case.

135-147 Argument of counsel.

148 Motion for directed verdict of acquittal denied.

EVIDENCE ON BEHALF OF DEFENDANT.

150-157 DANTE MASCIONE testified:

Direct Examination.

He was a professional photographer for thirty years. He made certain photographs at the home of Samuel and Belle Rugendorf at 3117 Jarvis Avenue. Defendant's Exhibit 2 showed the front and the east entrance, the house facing north, it being on an east and a west street; Ex-

178-180 JAMES DeBENDETTO, testified as follows:

Direct Examination.

That he was a distributor of dairy products and knew the defendant for about five years in connection with supplying the defendant's store with dairy products at 3758 South Wallace. He also knew other suppliers of the store, bread men and grocery men; and he knew that amongst the business associates or business people with whom the defendant did business in the area where he had the store that the defendant's reputation for honesty and fair dealing was good.

181-183 MRS. ROSE LAMS, testified as follows:

Direct Examination.

That she lived at 3115 West Jarvis just to the east of the home of the Rugendorfs. On the afternoon of February 18, 1962, between 3:00 and 5:00 o'clock a man was coming up her sidewalk to the front of her house and just slipped and caught himself. He rang her bell and introduced himself as Samuel Rugendorf's brother, Leo. He told her that Sam had given him the key to the house and that if she saw any lights in the house she should not call the police.

She had seen Leo Rugendorf once before.

184 *Cross Examination.*

Mrs. Lams stated she did not know who Leo Rugendorf was until he introduced himself. She did not see Leo enter the home at 3117 Jarvis nor did she ever see him again.

184-185 *Redirect Examination.*

Mrs. Lams testified that to her knowledge, Mr. and Mrs. Rugendorf were in Florida on February 18.

185 *Recross Examination.*

Mrs. Lams stated that Mrs. Rugendorf told her they were going to go to Florida and they generally tell her when they are going on a vacation and where they are going.

186-189 CLARENCE CRAMSIE, testified as follows:

Direct Examination.

That he worked for the Rugendorf Bros. Meat Company, Inc. at 2449 South Wentworth Avenue in Chicago for about four years. During those four years he never saw the defendant at the place of business; nor was the defendant ever employed there. On March 22, 1962, two FBI agents came into the place and asked for Sam Rugendorf. Max Siegel, his boss, told them that Sam Rugendorf's place of business was at 38th and Wallace and the agents left.

189-193 RICHARD B. LEE, testified as follows:

Direct Examination.

That he was an FBI agent and on March 22, 1962, in the company of FBI Agent Frank Grundler, arrested Samuel Rugendorf shortly before 6:00 P.M. at 3758 South Wallace Avenue in a store by the name of Sam's Wallace Foods, which was a little grocery and meat market. Before he went there he tried to find Sam Rugendorf at Rugendorf Bros. Meat Market, at 2449 South Wentworth Avenue. He was directed to go to 2449 South Wentworth Avenue by another FBI agent whose name he could not recall.

to take the laundry into the back utility rom where she did her laundry. Her husband, Sam, did not go into the basement between March 4 and March 22, 1962. He went to work between 6:30 and 6:45 every morning and returned at about a quarter to eight at night. He then had his supper, watched TV, and by 9:30 or a quarter to ten he went upstairs to bed. He worked seven days a week. Other than going to Florida, she and her husband have on occasion to go to Toronto, Canada to visit a daughter and three grandchildren.

On March 5, the day after she returned from Florida, she left her house to go to the bank and to visit her other grandchildren who live in Skokie. Just she and her husband lived in the house, so that when she was away the house was empty, other than a dog. On March 6 she went to her skin doctor and then to the veterinarian to pick up her dog. On March 7 she played cards with some of the girls and her sister-in-law, and was away from her home for four or five hours. On March 8th she went downtown with a friend, had a movie and lunch out. On Friday, she was home because the cleaning woman came on Friday. On Saturday, she went to the beauty parlor, then came home to let the dog out and put him back in the house. She then went to play Mah-Jong until 5:30. On Sunday she was always home. The following week, commencing with March 11, her routine was approximately the same. She was away from her home generally three or four hours nearly every day. During the time she was away from home, her husband is at work.

When the agents discovered the furs in one of the closets in her basement, Agent Moore asked her if she knew how the furs got there and she told him she was just as surprised as he was. He said that they had an informer who told them that the furs were stored in the house. One of

the agents said, "Your brother-in-law Leo has been the source of embarrassment to you people for some time now." She just looked at him, not knowing what to say, and she said, "Well, you learn to live with some things." (R. 213).

When the agents sorted the furs and took the bags that were in the closet to put the furs in there wasn't enough room to put them in the bags. In a corner of the recreation room near the pantry she had a laundry bag filled with soiled laundry. She emptied the laundry and gave the agents her laundry sack, which is Government Exhibit 83, the bag with the name Rugendorf printed on it. The three canvas bags being Government Exhibits 82, 84 and 85 were in the closet where the furs were. They could not be in the other corner because they have a pumping system there for flooding.

The next day, March 23, 1962, two FBI agents came to her home and stated that Mr. Monaghan, an Assistant United States Attorney, wanted to talk to her, so she went downtown with them and talked with Mr. Monaghan. No one was present in the room until the very end.

217 "Mr. Monaghan said that my husband was arrested because stolen furs were found on the premises of our home, and he said, "Well, we know your husband didn't do it, his brother Leo did it, because his brother is a well-known fence and he fences for two of his associates by the name of Panzica and Condick, and," he said, "your husband will be let out on bail, they're making bail for him now, there's an attorney there to see him, and when you go home and you talk to him ask him, is he going to take the blame, because he is the receiver? We have the merchandise found on your premises. Or is he going to tell us what we want to know?"

Mr. Monaghan asked her who had keys to her home and she told him that her son Jerome, her sister-in-law Rose Siegal and her brother-in-law Leo Rugendorf had keys.

Mr. Monaghan told her that she knew that her son
218 and her sister-in-law didn't do it but that she knew her brother-in-law did it. She told Mr. Monaghan, "I don't know, I wasn't there, I was not in town"

Her husband had his own place of business at 3758 South Wallace, Chicago, a grocery and meat store. They purchased the business on April 1, 1958 and she was in business with their son Jerry and her husband Sam. The defendant had no association with Rugendorf Bros. Meat Company on Wentworth Avenue at all. For five years prior to 1958, Sam was unemployed because of his health. He was a severe diabetic and was going blind. Prior to 1952, the defendant was connected with Rugendorf Bros. Meat Company.

Her home was heated with gas, and it runs without attending to it.

Between March 4 and March 22, 1962, she did not see or talk to her brother-in-law, Leo Rugendorf.

221-248 *Cross Examination.*

Mrs. Rugendorf stated she left Chicago on February 17, 1962, by Eastern Air Lines, stayed 10 days in Miami and 4 days in Nassau and returned to Chicago on March 4. For the trip she took certain clothes out of the particular closet where the furs were found, being two men's summer jackets. The other clothes were in the upstairs closets.

Both she and her husband each had a suit case.

222 "Q. Mrs. Rugendorf, when these agents came to your home on March 22 with this particular search warrant you stated that one of the agents said that
223 two informants or an informant had told them that

these furs were stored in your basement, is that correct?

A. Yes, sir, that was what was written in the warrant.

Q. Did they say that verbally to you, that an informant had told them that these furs were illegally stored in your basement?

The Court: Would you repeat that question? I didn't—

The Witness: I understand the question, Judge. But it has, you know—so much has happened since then, the exact wording I don't think I would remember, sir.

By Mr. Berg:

Q. In other words, you read it in the warrant?

A. I read the warrant. They handed me the warrant after they—see, when they came to the door and rang the bell, Mr. Moore showed me his credential, and he said could he and the other two gentlemen come in and talk to me? And I said, "Yes," and I opened the door and let them in. He gave me the warrant and I read the warrant. Couldn't believe what I was reading.

Q. What did you say at that time, if anything, when you had finished reading the warrant? Do you recall what your exact words were?

A. I don't remember the exact words. I know I 224 was just stunned. They said they would like to see the basement of the house and I said, "Yes, sir," and I put on the lights—

Q. Weren't your exact words after you read the search warrant that was presented to you by Agent Moore, quote, "Sam and I have been gone on vacation. If there's anything in our basement that is stolen we don't know anything about it. It must have been put there while we were gone by Sam's brother Leo"? Isn't that what you said?

A. No, sir. No, sir.

Q. You did not say that?

A. No, sir.

Q. All right. When you came down into the basement you stated that one of the agents said, "Yes, we know that Leo has been a source of embarrassment to you and that he has been much trouble to you and your family"?

A. He said, "He has been a source of embarrassment and humiliation," to us.

225 Q. And isn't it true, Mrs. Rugendorf, that actually it was you who said that Leo had caused you much embarrassment in the past as concerning his criminal activities, and that you felt that this was another instance of Leo getting Sam in trouble, wasn't it you who said that and not an agent?

A. No, sir.

Q. You did not say that?

A. No, sir.

Q. Mrs. Rugendorf, when you opened up the fur, or they opened up the fur closet, and you saw all those furs there—and you did see them there, didn't you, when they opened up the closet?

A. All I says was, "Oh, my God!"

Q. You said, "Oh, my God"? Isn't it true that upon seeing the furs you first stated, "Well, I have furs of my own, they might be in here"?

A. No, I didn't. He asked me, were mine in there?"

When the closet door was opened the agent asked her if any of the fur pieces were hers and she said that her fur pieces must be upstairs. After examining the furs in the closet, she identified a Persian Lamb black coat and stated that it belonged to her because it was in her house. The fur actually belonged to her sister-in-law, but she had the coat for a couple of years and she automatically said that the coat was hers.

The three white bags were not lying on the floor in the panel basement in plain view in the northwest corner. She told the agent she never saw the bags before when they brought them out of the closet. Her brother-in-law Leo had a key and did not return it either to her or to her

husband. The key was not returned to her husband on March 5, 1962, by Leo Rugendorf. She saw her brother-in-law quite often; he would come to her house. When she was out of the house her husband had no occasion to come home in the daytime once he had gone to work. Her residence was 7400 North and 3100 West. Sam's place of business was 3700 South and about 600 West.

Her son and sister-in-law Rose always had a key to the house.

When the warrant was served upon her she glanced through it. She recalled there was no name on the warrant but that it just said, "Resident, 3117 West Jarvis Avenue", and she thought that the warrant was to search the basement of the premises. She did not remember the exact words in the warrant, but in Mr. Monaghan's office, Mr. Monaghan told her the Government got their information from an informant who was a government informant on previous occasions. The actual search warrant itself stated that furs were in the basement and they directed a search at the residence at 3117 West Jarvis and the furs were suspected of having been taken from a burglary in Mountain Brook, Alabama, on February 10th. When Mr. Moore handed her the warrant and stated they would like to see her basement, he did not say anything about informants.

249-285 SAMUEL JOSEPH RUGENDORF testified on his own behalf as follows:

Direct Examination.

That he lived at 3117 West Jarvis, was fifty-five years of age. He started working when he was six years old selling newspapers, after which he shined shoes. He completed one year high school and then left to go to work as a messenger boy delivering telegrams. He worked as an apprentice butcher in a butcher shop when he was four-

teen. With the exception of a five year period from the age of fourteen until his present age, he was continuously engaged in the meat and grocery business. In 1928 he started his first business at 3500 Wentworth Avenue under the name of Herman Rugendorf which was his father's name. He owned and ran the business for thirty years from 1927 until about 1947 or 1948. It was a grocery, fruit, vegetable and meat business. He started with his sister Jean Rugendorf who was now Mrs. Jean Witt. For twenty years he worked nearly every day including Sunday. From 1927 until 1947 when he was running the business known as H. Rugendorf, he was never arrested.

In 1947 he took into partnership his younger brother, Leo. The name was then changed to Rugendorf Bros. Sometime between 1947 and 1952, the partnership was changed to a corporation and they moved across the street to 3503 Wentworth Avenue. In 1952 he disassociated himself from the business in which his brother was a part, which was known as Rugendorf Bros., Incorporated. From 1952 to the present day he had no business connection with Rugendorf Bros. Meat Company with which his brother Leo was associated.

When he left in 1952 he wasn't feeling well, as he was a diabetic and was losing the sight of his eyes. He was advised to take it easy. He did so for about five years until 1957. In 1957 he started another business known as Sam's Wallace Foods located at 3758 South Wallace Street, Chicago. It was a combination grocery store and little meat store. His partners in the business were his son, Jerome, and his wife. Leo Rugendorf was in no way connected with his business on Wallace Street; and he was in no way connected with Leo Rugendorf's business.

From 1947 to 1952 he was never arrested or charged with any crime. From 1952 until 1957 when he started

his business he was never arrested or charged with any crime. From 1957 when he started his business to March 22, 1962, he was never arrested or charged with any crime.

Since he purchased his store his routine was as follows: He woke up at 5:30 or a quarter to six every morning. He washed, shaved, had a cup of coffee or some juice and went to the store. The store hours were from 7:30 in the morning until 7:00 at night, although he was sometimes there from a quarter to 7:00 until 7:30 or 8:00 o'clock. On Sundays he arrived at the store at 7:00 in the morning and stayed there until 2:30 or 3:00 o'clock in the afternoon. He usually arrived home at about 8:30 or a quarter to nine in the evening. His home was about 19 miles from the store. He took trips to Canada with his wife for the purpose of seeing his grandchildren in Toronto. During the time when they were absent, he had given his keys in the past to his son Jerome, to his neighbor, Nathan Roskin, and to his sister, Rosalie Siegel. His brother, Leo Rugendorf had a key.

On February 17, 1962, he and his wife left Chicago for a vacation. They had the reservations for the ticket one evening prior. They told his sisters, friends and neighbors they were leaving town.

His brother, Leo, came to his place of business at 3758 South Wallace on the night of February 17, 1962, around 6:00 or 7:00 o'clock. Leo asked who was going to look after the mail, clean the sidewalks and everything else and he told Leo that his son Jerry would do it. Leo said that Jerry had to open the store every morning and stated that he got down a little later every day and so why not let him watch the house and bring in the mail. Accordingly, he gave his brother the keys.

From that day, on February 17, 1962, until this day he had not seen or talked to his brother Leo; nor had Leo returned the key.

He left Chicago on February 17, 1962, and returned on March 4th. Prior to February 17 he had no occasion to go into the basement and look in the closets for any reason. From March 4 to March 22, 1962, he did not go to the basement for any reason. When he came home from work at about 8:30 at night, he washed up, had his dinner, observed television for a little while and by the time he watched television, he got drowsy and so he went upstairs to the bedroom to sleep so he could get up early the next morning. On Sunday afternoons between March 4 and March 22, he came home at about 3:00 o'clock in the afternoon. He had no occasion to go to the basement for any reason. His house was heated by gas and it was not necessary for him to attend to the heating. The thermostatic control to the gas was in the parlor of the house and that regulated the heat.

He did not know at any time that furs were stored in the basement of his home in a closet. He did not put them there. Neither did he aid or abet anybody in putting them there. Neither did he receive or conceal the furs which were introduced into evidence. He did not have anything to do in any manner with the receiving or the concealing or the storing of the furs introduced into evidence.

On March 22, 1962, at around 5:30 P.M. he was arrested. He had never been arrested in the 55 years of his life before. About 6:00 o'clock or 7:30, two FBI men arrested him. They put him in an automobile and one of the agents asked him where his brother was. They asked where they could find Leo and he told them at Leo's place of business at 23rd and Wentworth. They asked him about how many fur pieces his wife had and what his wife was going to do with the furs. He told them that his wife had one fur piece that was 15 years old, another piece about 12 years old and another one about 18 or 20 years old. They then took him to the FBI headquarters. Other agents were in the room. They asked him about his wife, about

his home life, about everything. They asked him where he lived and they asked him if he knew that they had just been to his home and that they had taken out a lot of furs. They asked him if he was down in Alabama or New Orleans or somewhere. He was dazed and didn't know where he was because this was the first time he had ever been interrogated. He had never been to Alabama. He told them everything he knew since he was born. The asked him about the furs and he told them he had never seen any furs. He didn't know anything about furs. After being interrogated for about an hour or hour and a half, he started screaming and stated he needed his Orinace. He told them he was a diabetic in the worse form and that he needed Orinace. They were very nice. Some gentleman said to another one to go and get him the Orinace. They asked him "Are you going to tell us who put them there?" "I said, 'I don't know. I was out of the country at the time.'

"Did your brother put them there?

"I says, 'I would not know.'"

"Well, we know your brother put them there. If you will tell us that your brother put them there you can go home." (R. 278).

279 I says, "I cannot tell you my brother put them there because I wasn't there to see him put it. You fellows saw him put it there, you fellows claim it was him, why do you not pick him up instead of me? I have never been arrested, I have never been brought in, I have never been in anything like this, I'm sick, I haven't had a thing to eat all day, I'm a diabetic, I've never been used to this treatment, and I'm very, very scared and nervous."

A man took me into—the two gentlemen got through with me, took me into another room, and they showed me the fur coats. They were on a rack in an office, with a lot

of men, fellows, standing around. A gentleman says to me, I don't know his name, there were between six or seven gentlemen around the table and the fur coats were strung all over the room, he says to me, "Do you recognize them?"

I says, "No, sir."

He says, "Do you mean to tell me you don't recognize them?"

I says, "No, sir."

He says, "They were taken out of your basement."

280 I looked at the man. I says, "Out of my home, out of my basement?"

He says, "Yes." Walked over to a bunch of bags, picked up the bags, he brought them over, he said, "Here, is this your bag, your laundry bag?"

I says, "I wouldn't know."

He says, "Man, your name is on that bag, you got—"

I says, "Yes."

He says, "Is that your name?"

I says, "Yes."

He says, "And you mean to tell me you don't know that that laundry bag is yours?"

I says, "Yes, sir, I mean to tell you, I don't know." He says, "This bag was taken out of your home and you mean to tell me this is not your bag?"

I says, "That is true."

He says to me, "Where is Leo?"

I says, "I do not know, unless he is in his butcher shop, or home."

"Do you know his home number?"

281 I was in a daze, I was hungry, I was tired.

He says, "Can you get him on the phone? What is his number?"

I says, "Right now I don't even know my own name, bad enough, but he's in the telephone book. If you will look it up you will find the number."

They handed me the phone book. I was too nervous. They looked it up. They handed me the phone.

I says, "Will you dial the number please?"

I was shaking. They dialed the number, they gave me the number, they told me what to say.

My sister-in-law Kate Rugendorf answered, Leo's wife. I says, "Kay," I says, "this is your brother-in-law Sam Rugendorf." I says, "Is Leo there?"

She says, "No, he's not in. Where are you at?"

I was told to say that wherever I am she cannot reach me, because I will not be at the same number long, I would call her back.

282 The gentleman that got that number heard the conversation, told me to hang up and tell her I'd call back, and I hung up.

He says, "Do you know where else he could be?"

I said, "If he's not home I do not know his haunts, but you can try. If you fellows know I will be happy to do whatever you want."

He says, "How about Rose Siegel? Could he be at Max's or Rose's house?"

"We can try."

"Do you know their number?"

"Yes."

"What was it?"

I gave them the number, "But you'll have to dial."

They dialed it for me. I got ahold of Rose Siegel, and she says, "Who is this?"

I says, "This is your brother. Is my brother Leo, or your brother Leo there?"

She says, "Where are you at?"

The same answer I gave to her. I says, "Do you know where he's at?"

She says, "No, but if he comes in where can he 283 reach you?"

I said, "I'll call him back," and that was the end of the conversation.

They took me back into the other room where I was interrogated, kept me there, kept asking me question after question. He says to me, you know, he says, "We don't believe you, that you don't know where your brother is, and we know you know where he's at."

I said, "I'm sorry, I don't. I've cooperated with you in every manner, shape or form. You took me out of a place of business, I have had nothing to eat all day long, I'm hungry, I'm tired, and more so scared."

"Well," he says, "well," he says, "you know you can go home right now if you will tell us Leo put the furs down there."

I says, "If I can tell you that Leo did it and saw him do it I will tell you. I do not like this. I have never been put through this kind of a deal and I do not like it."

He says, "Well, Sam, it looks like you're not going home tonight." But before that he says to me, "Will 284 you swear on your mother's grave that you know nothing about these furs?"

I says to the gentleman, I says, "Not only will I swear on my mother's grave, I'll swear on my father's grave. I'll also take a lie detector test and I'll pay for it myself."

With that they says, "Well, come on." The gentleman that was in charge, whoever he was, I do not know his name, says. "Take him, have him locked up, but before you do see that he gets his Orinase, see that he gets his—something to eat."

They took me into their car, they rode me down to Van Buren or somewhere to a restaurant, one of the agents got out, which was very, very nice, I says, "I haven't had my Orinase, I haven't got a prescription, please go into a Walgreen Drug Store, tell him you have a man that is a diabetic that must have Orinase."

The gentleman says, "I will go in." I think his name—since he was up here on the stand, his name must be Mr. Lee.

285 No agent or anybody with the United States Attorney's office gave him a lie detector test as he reqested. He was willing even now to take a lie detector test.

He did not know where his brother Leo was and he had no contact with him since he returned to his home on March 4, 1962.

286-329 *Cross Examination.*

He testified that other than on social occasions, he did not see his brother Leo. He had seen his brother two doors east of the Rugendorf Bros. Meat Company, because that is where his barber was, the barber where he had been going for the last fifteen or twenty years. The barber-shop's name is Materio's Barber Shop. He has never been in the Rugendorf Bros. Meat Market. He has seen his brother at the Twin Food Products. He did not tell agents Lee and Grundler that Leo returned the key to him at about March 3 at his store.

His brother Leo lived at 4020 Chase Street in Lincolnwood, Illinois, about a mile from his home. Leo has been to his home and he has been to Leo's home. He did not have a conversation with Leo on March 3, nor did he tell the agents that he had.

296 By Mr. Berg:

Q. Did Leo put these furs in your basement?

A. I do not know, sir. From all indications, from what the Federal Bureau of Investigation men, when they had me under interrogation, told me, it was Leo, and they must know.

Q. Why do you suspect Leo of putting these furs
297 in your basement, other than the fact, you state here, you allege, that the FBI made these statements to you.

A. I did not allege. They did make them.

Q. What other reason do you have to suspect your brother Leo of putting these furs in your basement?

A. Everybody keeps hammering away at me, "We know it is not you, we know it is not you, it is your brother Leo, it is your brother Leo."

Q. What other reasons—

A. It is only hearsay.

Q. What other reasons do you have to suspect that your brother Leo put these furs in your basement?

A. What other reasons do I have to suspect?

Q. What other reasons do you have to suspect that Leo put these furs in your basement?

A. Just hearsay.

Q. What hearsay?

A. From your own people, the Federal Bureau of Investigation have been hammering away that he is a fence, he's a thief, he's this, he's that, the newspapers have been clamoring. If he is I didn't do it. You people say I didn't do it. Yet I am up here on trial for something
298 I didn't do. But Leo did it, because you people say—and as long as I say I do not know, I wasn't in the country, I am sitting here being tried for my life, is that it?

Q. Mr. Rugendorf, will you say from the stand then that it is only because you state that the FBI agents told you that Leo did it, that that is the only reason you suspect Leo put them in your basement?

A. Not only will I state, I will take a lie test right here in front of everybody here.

Q. So, therefore, if the FBI agents did not make this statement to you then you have no reason to suspect that Leo put them there?

A. Right you are, sir.

312 When he was being interrogated in the FBI Headquarters in the room he had no conception of time. It seemed to him like a lifetime, because he was never interrogated before in his life.

Q. How long were you in that room where they were interrogating you, as you put it?

A. As I say, Mr. Attorney, I don't know the conception of time. When you are locked up, you are nervous, you are irritable, you are hungry, and you are scared half to death, you have no—no knowledge of how much time you are in a place. You think you are there a lifetime and it 315 might be five, ten minutes, sir."

323 Q. Mr. Rugendorf, have you discussed your testimony with your counsel, your testimony before this court and jury?

A. I have talked to my counsel.

Q. With Mr. Echeles?

A. Yes. But I didn't know what testimony I am going to give, unless answer the questions you have given me. I didn't expect them.

Q. Well, the direct testimony of Mr. Echeles, the questions that he asked you, had you ever gone over those with Mr. Echeles?

A. I have talked to my counsel.

Q. And has he asked you those questions?

Mr. Echeles: I object, your Honor, what goes on between him and me.

The Court: Objection sustained.

Mr. Berg: I think, your Honor—

The Court: He is entitled to talk to his counsel. That is all right.

By Mr. Berg:

Q. Isn't it true that you were familiar with the 324 questions that were asked you today, that your counsel asked you on direct—

A. I refuse to answer that.

Mr. Echeles: Now, Sam, answer that question.

The Court: Wait a minute. Read the question. Read the question back.

The Witness: I don't understand what he is driving at.

The Court: Read the question back, Mr. Reporter.

(The last question was read by the reporter.)

The Court: Is the first part your question, isn't it true that you were familiar with the answers? Is that all of your question?

By Mr. Berg:

Q. Isn't it true that you were familiar with the questions that your counsel asked you on direct examination today?

The Court: Do you mean familiar with the answers to those questions?

Mr. Berg: I would like to know if he was familiar 325 with the questions.

The Court: All right. He may answer as to whether he was familiar with those.

A. I still don't understand what you are trying to get me to answer.

Mr. Echeles: Just answer the question if you can.

A. Well, he has been asking me questions here—

Mr. Echeles: Mr. Rugendorf, just listen to the question.

The Court: Just answer the question. Read it back.

(The last question was read by the reporter.)

A. Yes. I was answering the questions today.

By Mr. Berg:

Q. No. Did you know what questions your attorney was going to ask you today on direct examination, sir?

A. Yes.

Q. And you knew what answers you were going to give to, didn't you?

A. What questions and what answers I was going to give?

326 Q. Yes.

A. I was going to give the truth, yes.

Q. And you had gone over these questions and answers before, hadn't you, before you testified today?

A. With whom, sir?

Q. With your lawyer.

A. I have gone over everything with my lawyer. I've told him everything, sir.

Q. Mr. Rugendorf, you stated that you offered to take a lie detector test at the FBI office in front of Agents Lee and Grundler, is that correct?

A. I did, sir.

Q. And you stated again here from the stand that you are willing to take a lie detector test right now.

A. Right this minute.

Q. Are you willing to take a lie detector test in this case right now—

Mr. Echeles: We are willing to take a lie-detector test—

By Mr. Berg:

Q. Right now—

The Court: Objection sus- —

327 Mr. Echeles: We are willing. We are willing to take a lie detector test. He has now asked him if he

is willing to take a lie detector test, and we take him up on it, your Honor. We will take a lie detector test.

The Court: Just a minute. The question is an improper question. Lie detector tests are not evidence.

Mr. Berg: If counsel wishes to stipulate we will submit it to the jury on the basis of that lie detector test, but the Government makes this representation right now—

Mr. Echeles: We are willing—

The Witness: I will—

Mr. Echeles: Sam, take it easy.

The Court: Just a minute.

Mr. Echeles: We are willing—

The Court; Just a minute.

Mr. Echeles: —to take up—

The Court: Just a minute.

Mr. Echeles: —the challenge of the Government, your Honor.

328 The Court: Just a minute, just a minute.

Mr. Echeles: Yes, your Honor.

The Court: I said calm yourselves. If there is going to be anybody speaking loud it is going to be I.

What is the proposition? State it to me in audible terms so we can understand it rationally—

Mr. Echeles: My proposition, your Honor,—

The Court: Just a minute. One at a time.

Mr. Echeles: If the court please,—

The Court: Just a minute. I have called upon the district attorney.

What is your proposition, Mr. District Attorney?

Mr. Berg: My proposition, your Honor, is: The Government will gladly give the defendant a lie detector test if he will stipulate that the findings of that lie detector test will be submitted to the jury for the determina-

329 tion of whether the defendant is lying or not.

The Court: Now, does the defendant's counsel accept the offer?

Mr. Echeles: Do you accept the offer?

The Witness: I certainly do.

Mr. Echeles: We accept the offer, your Honor.

The Court: All right.

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330-333 *Redirect Examination.*

The defendant stated that he was brought before the United States Commissioner on March 23, 1962, the day after his arrest and he did not discuss the case with his lawyer. On April 20, 1962, the case was dismissed against him in the Commissioner's hearing and he thought he was free. It was not until he made his bond on his indictment that he came to the lawyer's office on June 4, 1962. It was then he told his lawyer what had happened. He then appeared before the trial judge on June 7, 1962, for his arraignment. He next discussed the case with his lawyer at his home on July 1, 1962.

334 Q. (By Mr. Echeles) At any time that you talked to me did I ever tell you what to say or suggest your answers?

A. No sir".

335 *Recross Examination.*

Q. (By Mr. Berg): And you studied those questions that are on that sheet of paper yesterday, didn't you, sir? And on Sunday, didn't you?

A. I am sorry, sir, I did not.

Q. You never read that sheet of paper—

A. I read something over there, but I didn't read no sheets of paper—

Mr. Berg: No questions.

Mr. Echees: I will submit to you that there are no questions on here. These are the notes taken."

336 *Redirect Examination.*

Q. (By Mr. Echeles) As a matter of fact, when Mr. Berg referred by pointing to pieces of paper I had in my hand, to questions I had in my hand a long foolscap white sheet of paper with some typewriting on it. When you read these, do you find any questions and answers on these sheets of papers?

A. No, sir.

Mr. Berg: We would be happy to stipulate it into evidence.

Mr. Echeles: We will get it in for you right away.

Mr. Berg: Thank you.

Mr. Echeles: We will accommodate you. I am checking it for spelling. Of course, we will be happy and privileged to receive your trial notes too.

If the court please, I would like the court reporter to mark this stapled group of white sheets of paper as Defendant's Exhibit 19 for identification.

(Said documents were marked Defendant's Exhibit 19 for identification.)

Mr. Berg: The Government has no objection to 337 that statement going into evidence.

The Court: For what purpose is it offered, so the jury will be fully informed?

Mr. Echeles: I have not offered them yet. I have not even identified them yet, but I will make the offer. It is offered to rebut the false insinuation made by the prosecutor when he pointed to the sheets of paper I was holding, that he was reading questions and answers from a sheet of paper, on which there are no questions.

Mr. Berg: Your Honor, I apologize—

Mr. Echeles: So they are going to be offered—

Mr. Berg: Apparently I was mistaken, that there weren't questions—

Mr. Echeles: So this is going to go in now, your Honor, because he is going to stipulate—

The Court: Wait a minute. I will say what goes in, your Honor.

Mr. Echeles: Excuse me, your Honor. I am go-
338 ing to offer it, your Honor, and the Government has stipulated that it may go in.

Mr. Berg: Absolutely.

Mr. Echeles: Finally I got a stipulation from them.

Mr. Berg: Absolutely.

The Court: All right. It is going in for the sole purpose of going to the question of whether or not there were questions and answers on there that the defendant might have read and considered, is that what it is offered for?

Mr. Echeles: Yes, your Honor.

The Court: And for no other purpose?

Mr. Echeles: Well, and to dispute the insinuation that the Government attorney has made.

Mr. Berg: Your Honor, I merely insinuated that he was reading a piece of paper over there. I presumed it was questions and answers. It was merely the answers.

• • •

339 The Court: The exhibit is in for a limited purpose, and that is whether or not the witness has seen that document in the form of questions and answers.

(Said exhibit, so offered and received in evidence, was marked Defendant's Exhibit 19.)

The Court: You may show it to the witness.

By Mr. Echeles:

Q. I show you a document, being stapled sheets of white paper with typewriting on it, marked Defendant's Exhibit 19, and ask you if that is the paper that Mr. Berg, the Assistant United States Attorney, referred to when he asked you whether or not you read that sheet of paper.

340 A. Yes, sir.

Q. Are there any questions and answers on that sheet of paper by which you could learn something or refresh yourself?

A. On here—

Q. This is simply a narrative, is it not, of my notes taken of an interview between myself and Belle Rugendorf, your wife, and myself and yourself, in my office, on 6:30 p.m. on June 4, 1962?

A. Yes, sir.

Mr. Echeles: I offer this into evidence and, if the court please, would the record note that the Government stipulated it may go into evidence?

The Court: For that purpose, that purpose of showing whether or not it was questions and answers. It may go in for that limited purpose.

342 It was stipulated that the defendant's car was stolen on March 22, 1962 and reported to the Chicago police.

345 (The following proceedings were had out of the presence and hearing of the jury:)

The Court: Let us find out who and when is going to conduct the lie test.

Mr. Echeles: Your Honor, the defendant would also like to know, and the defense counsel would like to know, so that these questions don't go off into the blue yonder, what the questions are going to be.

The Court: Wait a minute. If there is going to be a stipulation it will have to be the person who is designated to determine that. I am not going to determine it, nor no one else. We will select an appropriate person who will make the test.

Mr. Echeles: My suggestion is, and it is just a suggestion, that the court ought to select a person or company to give the test, not connected with the Government, that no government agency ought to do it.

The Court: Is it stipulated that both parties will
346 accept anyone that the court designates, and that the court itself will not make any attempt, as far as that is concerned, to tell them how to conduct the test, that it will be entirely up to the person or organization that is selected to make a test in their customary manner?

Mr. Berg: Your Honor, the Government will stipulate to any lie detector expert that the court sees fit to appoint in this matter.

Mr. Echeles: We will so stipulate, your Honor.

The Court: All right, it is so stipulated.

All right, gentlemen, will both of you make recommendations? I have no desire. Maybe you can agree upon one, and if you agree upon one that is the one I will designate.

Mr. Berg: Could I have one moment, if your Honor please? I am not an expert on lie detector matters.

The Court: Yes, yes. I don't want it to be left hanging in the air. I want a decision on it one way or the other.

Gentlemen, from my own experience, I would suggest, I believe it is, John C. Reid. I noted a number of instances where he has been called in. Is that agreeable to both parties?

347 Mr. Monaghan: If it please the court, if I may interject—

The Court: Yes.

Mr. Monaghan: I believe that an agreement has been reached on Professor Keeler's laboratory in LaGrange, of Northwestern University.

The Court: That would be just as good. I have used him in my own, that organization, in my own private practice twenty years ago. That is just as good. As a matter of fact, I was trying to think of the name, and Reid is one who is called, and Keeler is the other. That is agreeable.

Mr. Monaghan: Thank you.

The Court: All right. It is understood that the Keeler organization will be the one to give the test, and when shall it be given?

Mr. Berg: Well, it should be given as soon as possible, your Honor.

The Court: All right: We will do this then. We will give it Thursday afternoon as soon as the evidence is concluded here, and then we will go to the jury on Friday. Right?

Mr. Echeles: All right, your Honor.

Mr. Monaghan: Fine.

348 Mr. Echeles: That is a good suggestion, and that will give us some time on Thursday with your Honor to go over some instructions.

The Court: Yes. We will do it in that manner.

Mr. Monaghan: Your Honor, will we have the court's permission to contact Professor Keeler's laboratory and inform him of your order?

The Court: Both sides are directed to contact him.

Mr. Echeles: If the court please, for the defendant we should know the area of interrogation.

The Court: Contact him, ask him to come here and I will hold a hearing and we will arrive at that in discussion with him sometime on Thursday.

Mr. Monaghan: Fine.

Mr. Berg: And also we will have to have some kind of an agreement as to medication which can apparently upset the results of a lie detector test.

Mr. Echeles: I sort of resent that, Mr. Berg.

The Court: Come here Thursday morning and arrange for him to be here, and we will take care of that.

Mr. Monaghan: If it please the court, that had to
349 do with the fact that the defendant is a diabetic.

The Court: Yes.

Mr. Monaghan: That was the only inference intended by the Government at this time.

The Court: All right.

Mr. Echeles: I accept the correction.

The Court: Then Thursday morning, and we will agree on the scope.

Mr. Monaghan: Thank you, your Honor.

Mr. Echeles: Thank you very much.

And defense counsel, I am sure joined in by the Government, wish the court a happy holiday.

(Thereupon an adjournment was taken until Thursday, July 5, 1962, at 10:00 o'clock a.m.)

* * *

At the opening of the proceedings on July 5, 1962, the following occurred:

350 (The following proceedings were had in the presence and hearing of the jury:)

The Clerk: 62 CR 202, United States Of America versus Rugendorf, on trial.

The Court: There was an offer to take a lie test, and it was accepted by the Government, and temporarily I said, "All right, if you stipulate."

However, on my own motion and because that evidence is inadmissible, I am not going to permit it to be admitted.

It has never been done in my experience, even in a
351 civil case; and even though the parties may stipulate that something may be admitted to evidence, the final decision is my decision, and not their decision. They might stipulate that the Declaration of Independence might be read to you and would be appropriate evidence, theoretically. They might agree on it, but I would be the one to say it does not have anything to do with the case.

But I am refusing to permit the taking of and the admission as evidence the results of a lie test, for the reason that it has never yet either by statute or by rules of evidence, been considered or is it considered as competent evidnce. Certainly if the Government sought to introduce evidence of a lie-detector test it would be rejected and it would be highly prejudicial, and of course both parties know that, both sides know that this has never been admitted. So I am not going to make a guinea pig out of this particular case.

Experience has shown that the taking of lie tests is not infallible by any means. A highly emotional person might show up in response to the questions as being guilty
352 when he was not guilty. A very cool and collected person might be able to answer the questions without those little heartthrobs, extra heartthrobs, that this is based upon, and might be able to show himself not guilty when he was guilty.

And, certainly without any inference as to whether this defendant is or is not likely to be guilty, I am simply saying to you that it is not appropriate, I will not accept it, and that is that, and we will have no further reference to it, because it is not admissible either way. So we will have no further reference to lie tests in this matter, by either side.

Now you may proceed with further evidence.

Mr. Echeles: If the Court please, in that case the defendant rests.

353-354 ROBERT F. MONAGHAN testified for the Government in rebuttal as follows:

Direct Examination.

That he was an Assistant United States Attorney. He talked with Mrs. Samuel Rugendorf on March 23, 1962, in his office in the court building. His secretary was present part of the time and during his conversation other Assistant United States Attorneys, Mr. Svetina and Mr. Quan, came into the room, but left. During the conversation he did not state to Mrs. Rugendorf, "We know your husband didn't do it, we know that Leo did it." He did not state to her that, "You know that Leo did it, that he is a well known fence, that he fences for Condick, Schweihs and Panzica." Neither did he tell her, "Informants told us these furs were in your basement."

355-381 *Cross Examination.*

Mr. Monaghan testified he was attached to the case as a lawyer. At one time, when the jury was recessed he addressed the court in connection with selecting the organization to conduct the lie test. He further discussed the selection of the lie testing company with defense counsel. He was even in the case before the indictment was drawn up. He had asked the members of the FBI to pick up Mrs. Rugendorf and bring her down to his office. It was a day after the arrest of the defendant that he directed agents of the FBI to invite Mrs. Rugendorf to come to his office. The file in the case was in the hands of Mr. Quan and he had not seen the search warrant or the affidavit prior to his talking with Mrs. Rugendorf. Nobody advised

him or directed him to call Mrs. Rugendorf for an interview. He decided to call Mrs. Rugendorf himself. He knew that the furs had been recovered. He became aware that at the time the furs were recovered from the basement, Mrs. Rugendorf was present. He did not know whether he learned that information from a phone call from one of the FBI agents or whether Mr. Quan informed him, or someone else, that the furs had been recovered in the basement and that Mr. Rugendorf was in custody.

During the conversation with Mrs. Rugendorf she brought up the name Leo Rugendorf. He did ask Mrs. Rugendorf whether she had given her keys to anybody. It was during the conversation he had with her that she said something which led him to inquire about who had keys to her home. She told him that her son Jerome had a key and that her brother-in-law, Leo Rugendorf, also had a key. When he asked her who had keys and she gave him the names, he also asked her if she was suggesting that either one of those people, her son Jerry or her brother-in-law Leo put the furs in her basement and she said, "Oh, no." The entire conversation between him and Mrs. Rugendorf took fifteen or twenty minutes. No transcription or notes were made of the conversation he had with her. Although his secretary was present she was there doing only routine work while he talked to Mrs. Rugendorf.

Prior to the time he first spoke to Mrs. Rugendorf, he had knowledge from information he had received in the course of his duty, that Leo Rugendorf was engaged as a fence.

He did not read the search warrant or the affidavit in support of the search warrant before talking with Mrs. Rugendorf. Shown defendant's Exhibit 20 for identification the witness stated he saw page 1, or a copy of it and he has seen a copy of the affidavit.

372 "Q. And the blue page is a certification by the clerk of the District Court that the papers to which the blue paper is attached is a true and correct copy of what appears in the court file, isn't that so?

Mr. Berg: We will stipulate to that, your Honor.

Mr. Echeles: All right. Well, will you stipulate that this document may go into evidence?

The Court: Now, Counsel, you know that is not admissible into evidence.

Mr. Echeles: I am going to offer it, your Honor.

The Court: Well, then why ask a question of that kind?

Mr. Echeles: Because if he stipulates then there is no argument, your Honor.

The Court: All right, continue the trial."

381-383 *Redirect Examination.*

The witness stated that on March 23, he was busy preparing for another trial out of town.

384-388 AGENT MARLIN MOORE testified in rebuttal as follows:

Direct Examination.

That on March 22, 1962, at about 5:00 P.M. he served a search warrant on the premises at 3117 West Jarvis Avenue to Mrs. Belle Rugendorf and that she read the warrant. After she read the warrant she stated, "Sam and I just returned from a vacation; if there's anything stolen in the basement, we don't know anything about it, and if there is something stolen in there, Leo must have put it there."

When they located the furs in the closet Mrs. Rugendorf identified one of the furs, a Persian Lamb, and stated, "This is my fur."

Neither he or any agent in his presence told Mrs. Rugendorf, "We know that your husband Sam and you had been caused a lot of embarrassment by your brother-in-law Leo, and we know that Leo is getting you in trouble again."

When they discussed how the furs could have gotten in the closet in the basement, Mrs. Rugendorf said, "This looks like another instance where Leo has gotten Sam in trouble and caused us embarrassment."

The three white bags, Exhibits 82, 83 and 85 were not in the closet, but were found four or five feet out of the corner in the northeast corner on the floor of the recreation room. After they had taken the furs from the closet the witness asked Mrs. Rugendorf if they could use the bags to take the furs to the office and she replied, "Yes, they're not mine, I have never seen them before. Go ahead and take them."

Neither he or any agent in his presence told her, "Informants have told us that these furs were in your basement."

390 *Cross Examination by Mr. Echeles.*

"Q. I show you what have been marked Defendant's Exhibit 20, and ask you if that is a copy of this search warrant which you served upon Mrs Rugendorf?

A. Yes. The first page is the front, the second page is the back, of the same document.

Q. The second page is a return which you made after you searched the basement?

A. The back side of the same document.

Q. The back side?

A. Yes. There are not two separate documents. There was one document.

Q. And I show you pages 3 and 4 of this group of white sheets, and ask you if that is not an affidavit which you signed in support of your securing the search warrant?

A. Yes, it is.

Mr. Echeles: If the Court please, I offer Defendant's Exhibit 20 into evidence.

Mr. Berg: I object.

The Court: Objection sustained. Refused.

Mr. Echeles: No further questions.

The Court: It has nothing to do with the case what-
391 soever."

391-409 AGENT RICHARD LEE testified in rebuttal as follows:

Direct Examination.

That when he and Agent Grundler arrested Sam Rugendorf, he made a search of the premises at 3758 South Wallace Avenue, Chicago. They then took Mr. Rugendorf to the FBI Headquarters and the trip took approximately fifteen minutes. During the drive he did not ask the defendant where they could find Leo, nor did they direct the defendant to drive to Rugendorf Bros. Meat Market. Neither did he ask how many furs his wife had nor where she kept them. They did not drive round and round and round and they did not pound questions at him. When they took him to the FBI Headquarters they did not interrogate him for an hour and an hour and a half. During the time the defendant was being fingerprinted the defendant said that he was a sugar diabetic. The witness then asked him if he needed medication and food and the defendant declined both. The defendant said his diet consisted of Oranice, to be taken with his breakfast and his supper and that there was no particular eating schedule that he had. They offered the defendant Oranice, medication and food on four more occasions while in office. They asked him whether he wanted food and medication approximately every thirty minutes. The defendant declined on each occasion. When they drove the defendant from the FBI Headquarters to the Chicago Police Department, they drove by a drug store and the witness went to the drug store and obtained four Oranice tablets.

Following the photographing and fingerprinting of the defendant he was taken to another office and asked concerning his knowledge of the furs that were located at his residence. During the interview neither the witness nor anyone in his presence stated "We know your brother Leo put them there." Neither did anyone direct the defendant to find out where his brother Leo was; nor did anyone direct the defendant to call his brother Leo. The defendant had said that he knew nothing about the furs and knowing about how they got into his house. He stated that he had been on a vacation with his wife and that they left Chicago about February 18th. He said that on February 17th his brother Leo came to his store, asked for and obtained a key to his residence in order to take care of the mail and to look after the house in general. The defendant also said that son Jerome and a neighbor also had keys to the house. The defendant said it was inconceivable to him that his son or his neighbor could possibly have anything to do with the furs. "He said that the only explanation that he could offer was that his brother Leo must have put them there, since he had a key, and because Mr. Rugendorf was aware of his brother Leo's past criminal activities."

The defendant said that upon his return from his vacation about three weeks prior to the date of his arrest that Leo again came to his store and returned the key to his residence.

During the interrogation, "Mr. Rugendorf had indicated that it was his feeling that Leo must have put the furs in his home, and stated that he wanted to get in touch with his brother Leo." The defendant first called his brother's residence and then his sister's residence. A third call was made to a professional bondsman.

At no time did the witness nor any agent in his presence state, "We don't believe you don't know where your brother Leo is. We know you know where your brother Leo it." Nor did he say, "You can go home right now if you tell us Leo did it." Nor did anyone ask the defendant, "Will you swear on your mother's grave that you don't know anything about these stolen furs." Nor did the defendant state at any time during the interview, "I will take a lie detector test."

He arrested the defendant about 5:50 P.M. and started for FBI Headquarters at about 6:05, arriving there between 6:15 and 6:20. The defendant advised the witness that he was a diabetic at about 6:25 P.M. Every half hour until they left the FBI Headquarters at 8:50 P.M. the defendant was asked if he wanted medication and food. They left the FBI Headquarters to go to the Chicago Police Department lock up at 8:50 P.M. and arrived at 9:50 P.M. On this trip Mr. Rugendorf accepted medication and food. They stopped at the YMCA, where Mr. Rugendorf had something to eat.

410-428 *Cross Examination.*

Agent Lee testified he did not know who in the FBI office or in the United States Attorney's office directed him to arrest the defendant. He did not have an arrest warrant with him when he went to arrest the defendant. The witness knew he was going to testify in rebuttal two days prior. He refreshed himself by going over his notes of the events that occurred on March 22, 1962. He did not ask anyone in the two days how it was that he went out to arrest the defendant.

He was in a car near the Rugendorf Bros. at 2449 Wentworth Avenue when he received a radio call and went to Rugendorf Bros. to ask for Sam Rugendorf. He spoke to

some people in the store and they told him Sam did not work there, that Sam was no longer actively associated with that store. They gave the witness the approximate area, 38th and Wallace where Sam was. The defendant was found in a little grocery store at 38th and Wallace. That address was 13 blocks south and about 7 blocks to the west of Rugendorf Bros. When they drove from 38th and Wallace to 536 South Clark Street to FBI Headquarters they went on 38th Street to Wentworth Avenue, north on Wentworth to Cermak, Cermak to Clark Street and down Clark Street to the headquarters. When they went north on Wentworth Avenue they went by Rugendorf Bros. Meat Market. There were other ways to get to 511 South Clark Street than by going north on Wentworth Avenue. They could have gone north on Canal Street or could have gone north on Union Street to 26th Street.

Every time they asked the defendant if he wanted Oranice they made a log. Mr. Rugendorf was making no notes during the time he was talking to them, nor was he writing anything down.

429 Whereupon both sides rested.

430-432 Defendant moved for a directed verdict of acquittal; the court denied the motion.

434-510 Tendered instructions and discussion thereon.

511-566 Argument of counsel.

567-585 Instructions of the court.

586-588 Agreement that defense objections made during the discussion on the instructions stand as objections to the instructions as given.

588-589 The Government objected to Defendant's Exhibit 19 going to the jury. It was pointed out that the court had admitted defendant's Exhibit 19 into evidence and instructed the jury that all evidence that went in may be received and considered by the jury.

590 The court allowed the prosecutor's motion preventing Defendant's Exhibit 19, admitted into evidence, from going to the jury.

592-595 Verdict of the jury finding the defendant guilty as charged in the indictment.

596-598 Colloquy of counsel.

599 Certification by the court reporter.

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[fol. 69]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 13967

September Term 1962—April Session 1963

UNITED STATES OF AMERICA, Appellee,

v.

SAMUEL JOSEPH RUGENDORF, Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

OPINION—April 30, 1963

Before DUFFY and KNOCH, Circuit Judges, and MERCER, District Judge.

DUFFY, Circuit Judge. Defendant was tried before a jury and was convicted of receiving, concealing and storing goods, wares and merchandise of a value in excess of $5,000, knowing the same had been stolen and transported in interstate commerce in violation of Section 2315, Title 18, United States Code. The goods were identified in the indictment as 81 fur pieces which had been stolen in Shreveport, Louisiana and Mountain Brook, Alabama, and which had moved in interstate commerce from Shreveport and Mountain Brook to Chicago, Illinois.

On this appeal, defendant argues (1) the evidence was insufficient to sustain the verdict of guilty; (2) the trial court erred in overruling defendant's motion to suppress the evidence, and (3) the trial court erred in refusing to require the government to reveal the source of the information contained in the affidavit, pursuant to which a search warrant was issued.

Defendant and his wife owned and occupied a two-story [fol. 70] brick, single family dwelling in the City of Chicago. The basement was partitioned into two sections by a wall

running east and west. The rear or south part contained two smaller rooms, one of which was a laundry and furnace room, and the other a general storage room. In the northern section, there was a nicely finished recreation room. At the east wall of this room there was a business-type desk with a telephone. In the center of the room was a card table and sewing machine. There were closets built into the north wall. During the search, Agent McCormick opened the doors to these closets, and in the last one discovered 81 furs hanging on individual wire hangers which hangers were on a rod that extended the length of the closet. The labels had been torn out of the garments. There were, in fact, 82 fur pieces, but Mrs. Rugendorf, the wife of defendant, identified one of the fur pieces as belonging to her.

Defendant's wife testified that she and her husband left Chicago on the evening of February 17, 1962, for a vacation in Florida and Nassau; that they returned to Chicago on March 4, 1962; that during the period of their absence, her brother-in-law, Leo Rugendorf, her son, her sister-in-law and one Roskin all had keys to the house. She testified the defendant did not go into the basement between March 4, and March 22. The defendant gave similar testimony and in addition testified he had no occasion prior to February 17, 1962, to go to the basement or to look at the closets. There also was testimony that defendant's brother, Leo, was a well-known "fence."

There is no dispute that on March 22, 1962, agents of the Federal Bureau of Investigation found in the basement of defendant's home, the loot of two burglaries, one of which occurred at Shreveport, Louisiana, December 4 and 5, 1961, and one at Mountain Brook, Alabama, on February 10, 1962.

There were a number of conflicts in the evidence which the jury was entitled to and did resolve. To illustrate, defendant testified that before he left on his vacation, he gave the key to his house to his brother Leo and that the key had not been returned. Agent Lee testified that when defendant was arrested he stated that Leo came into defendant's place of business shortly after he had returned from Florida and returned the key to him.

The situation in the case at bar is somewhat similar to
1. 71] that in *United States* v. *Mann*, 7 Cir., 108 F. 2d 354,
, where he said: "Here, the jury rejected defendant's
fessions of innocence in the face of stubborn facts
inly pointing to his guilt."

Knowledge of the stolen character of the goods may be
ablished by circumstantial evidence. *United States* v.
Brien, 7 Cir., 174 F. 2d 341; *United States of America* v.
egrucci, 3 Cir., 258 F. 2d 70.

We hold that the evidence, viewed in the light most
orable to the government, clearly supports the convic-
n of the defendant.

Defendant argues that the affidavit which was the basis
he issuance of the search warrant was based on hearsay
ormation and therefore insufficient. Defendant relies
n *Jones* v. *United States*, 362 U. S. 257.

Agent Moore of the F. B. I. swore that an informer who
furnished reliable information in the past reported to
ant that he had seen 80 fur garments in defendant's
ement a few days previously, describing them as mink,
r and beaver jackets, with labels removed, and that the
ormant had been told the furs were stolen.

We think defendant's reliance upon *Jones* v. *United*
tes, supra, is misplaced. We quote the following from
opinion in that case (pages 270-271): " . . . In a doubt-
case, when the officer does not have clearly convincing
dence of the immediate need to search, it is most im-
tant that resort be had to a warrant, so that the evidence
he possession of the police may be weighed by an inde-
dent judicial officer, whose decision, not that of the
ce, may govern whether liberty or privacy is to be
aded.

We conclude therefore that hearsay may be the basis
a warrant. We cannot say that there was so little basis
accepting the hearsay here that the Commissioner acted
roperly . . . But there was substantial basis for him to
clude that narcoties were probably present in the apart-
t, and that is sufficient. . . . "

n *United States of America* v. *Eisner*, 6 Cir., 297 F. 2d
596, the Court, relying on the *Jones* case, upheld the
iciency of an affidavit which stated " 'Information has

been obtained by S. A. Clifford Anderson, F. B. I., Cincinnati, Ohio, which he believes to be reliable to the effect that Sam Eisner received furs which were a part of the [fol. 72] loot from the Davidson, Indiana Fur Co. in Ky., after they had been transported from Indianapolis, and had knowledge that they had been stolen.'" It will be noted that the affidavit in the case at bar is quite similar to that approved in the *Eisner* case.

We hold there was no abuse of discretion on the part of the Commissioner in issuing the search warrant. There was present a sufficient basis for the determination by the Commissioner of the existence of probable cause.

The remaining point raised by defendant as error is the refusal of the trial court to require the disclosure of the name of the informer. The defendant relies on *Roviaro* v. *United States*, 353 U. S. 53.

At the trial, when the prosecutor refused to disclose the name of the informer, he stated the ground of his objection was "because it would cause a possible murder." Involved here is what has often been termed the "informer's privilege." However, it is the privilege, if any, of the government to withhold the names of persons who have supplied information leading to the detection of crime and the apprehension of the criminal.

The Supreme Court, in the early case of *In re Quarles and Butler*, 158 U. S. 532, 535-536, stated: " . . . and such information, given by a private citizen, is a privileged and confidential communication, for which no action of libel or slander will lie, and the disclosure of which cannot be compelled without the assent of the government. . . . "

However, an exception to this rule was stated in *Roviaro* v. *United States*, 353 U. S. 53, 60-61. The Court there held that when the disclosure of the name of the informer is "relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." The Supreme Court further stated in *Roviaro* v. *United States, supra*, at page 62: "We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. . . . "

In *Roviaro,* the informer was the only person, other than the defendant, who participated in the transaction charged in the indictment. He was the only witness other than the defendant who could have disclosed entrapment, if any.

[fol. 73] In *Jones* v. *United States of America,* DC Cir., 271 F. 2d 494, 496, fn. 3, cert. den. 362 U. S. 918, the Court had for decision the question of whether it was error to fail to disclose the name of the confidential informant, when it was his information, relayed through another agent, that was the basis of establishing probable cause. The Court there said that *Roviaro* was applicable only when the informer " *'helped to set up the commission of the crime and . . . was present at its occurrence.'* . . . (Emphasis added.)"

The Courts of Appeal of several Circuits have considered the reach of *Roviaro* but have, nevertheless, upheld the action of trial courts in refusing to compel the government to disclose the name of the confidential informant.

In *Miller* v. *United States of America,* 5 Cir. (1959), 273 F. 2d 279, cert. den. 362 U. S. 928, the trial court had refused to require the government to disclose the name of the informant who had furnished the information giving the officers probable cause to arrest without a warrant. The Court of Appeals discussed *Roviaro* and also *Gilmore* v. *United States of America,* 5 Cir., 256 F. 2d 565, and stated at page 281: "We think that the circumstances of this case differ crucially from those cases in which disclosure was required. We hold that it was not error to refuse to require the Government to divulge the identity of its source of information . . . We are not dealing with one who was an active participant in the crime . . . and one who would have been able to testify directly about the very transaction constituting the crime . . . We think all the evidence discloses is that the informer was an informer and nothing more."

In a recent case, the Fourth Circuit, in *United States of America* v. *Whiting,* 311 F. 2d 191 (1962), refused to compel the government to disclose the name of a confidential informant who had furnished information leading to the obtaining of a search warrant. The Court said at page 196: "In the present case, however, we have no such situation for, as the attorney for the defendants admitted, the names

of the informers were wanted in support of the effort to invalidate the search warrant and not to help the defendants in the presentation of their case."

[fol. 74] We hold it was not error for the trial court to refuse to compel the government to disclose the name of its confidential informant.

AFFIRMED.

[fol. 75]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Before: Hon. F. Ryan Duffy, Circuit Judge, Hon. Win G. Knoch, Circuit Judge, Hon. Frederick O. Mercer, District Judge.

No. 13967

UNITED STATES OF AMERICA, Appellee,

vs.

SAMUEL JOSEPH RUGENDORF, Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

JUDGMENT—April 30, 1963

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, in accordance with the opinion of this Court filed this day.

[fol. 76]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Before: Hon. F. Ryan Duffy, Circuit Judge.

[Title omitted]

ORDER CORRECTING TYPOGRAPHICAL ERROR IN TRANSCRIPT—
May 13, 1963

On consideration of the motion and affidavit of counsel for defendant-appellant,

It Is Hereby Ordered that the following correction of a typographical error as it appears on page 13 of the appendix be made in order to conform with the original transcript of proceedings as certified and filed in this Court, on page 15, so that the paragraph may then read:

> "Mr. Echeles: *Roviera* v. *United States,* which is cited by our Seventh Circuit as authority for this proposition, states that if the informants, if the names of the informants are necessary to a proper defense or a proper presentation of the defendant's case in attacking the search warrant, then in the interest of justice it must be given to the defendant. The government has no reason not to give it, said *Roviera,* and that is the controlling law."

[fol. 77]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Before: Hon. F. Ryan Duffy, Circuit Judge, Hon. Win G. Knoch, Circuit Judge, Hon. Frederick O. Mercer, District Judge.

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—May 24, 1963

It Is Ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby Denied.

[fol. 78] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 79]

SUPREME COURT OF THE UNITED STATES

No. 223—October Term, 1963

SAMUEL JOSEPH RUGENDORF, Petitioner,

vs.

UNITED STATES.

ORDER ALLOWING CERTIORARI—October 14, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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Office-Supreme Court, U.S.
FILED
JUN 21 1963
JOHN F. DAVIS, CLERK

No. 223

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1963

SAMUEL JOSEPH RUGENDORF,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NO.

SAMUEL JOSEPH RUGENDORF,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To Honorable, Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Samuel Joseph Rugendorf, respectfully prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit entered on April 30, 1963.

JUDGMENT AND OPINION OF THE COURT BELOW

On April 30, 1963, the United States Court of Appeals for the Seventh Circuit affirmed a judgment of conviction entered in the United States District Court for the Northern District of Illinois, sentencing defendant to imprisonment for a term of ten years. The Court of Appeals' opinion has not as yet been reported. It is printed herewith as Appendix "A".

JURISDICTIONAL STATEMENT

On a jury trial, defendant was convicted of receiving and concealing merchandise of a value in excess of $5,000.00, knowing the same to have been stolen in violation of Section 2315, Title 18, U. S. Code.

On appeal to United States Court of Appeals of the Seventh Circuit, the judgment of conviction was affirmed by an opinion filed April 30, 1963 (Appendix "A").

A petition for rehearing was timely filed, and was denied on May 24, 1963. (Appendix "B").

The jurisdiction of this Court is invoked under the provisions of Title 28, U. S. Code 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Does the so-called "informer's privilege" against disclosure, extend to any matter not related to the identity of the informer?

If so, what is the limit of the reach of the privilege?

And does the "privilege" ever authorize the withholding of facts which might establish innocence and which would not compromise the identity of the informant?

2. May a conviction on a charge of receiving stolen property, Title 18 U.S.C. Sec. 2315, be predicated entirely and solely upon proof that stolen property was found on premises partially occupied and partially owned by defendant, but to which a number of others also had access?

3. Where a defendant has never before been arrested or charged with a crime; and where the defendant makes a strong and uncontested showing of previous good character; and where the police testimony establishes that the defendant is not known to be engaged in any form of criminal activity; then,

May disclosure of the identity of an informant be withheld because of the prosecutor's unexplained and unsupported assertion that such disclosure "might and probably would" result in the informant's death?

4. May the disclosure of the identity of an informant, or other facts concerning his activities, be compelled only if the informer is first proven to have been a moving party in the commission of the crime, and under no other circumstances whatever?

5. May the disclosure of facts relating to an informant be withheld in all proceedings wherein a defendant seeks to invalidate a search warrant obtained on information supplied by that informant, simply by reason of the nature of the proceedings and without regard to any other consideration whatever?

STATUTES INVOLVED

Title 18 U. S. Code Section 2315. (Relevant portion set out in Appendix "C").

STATEMENT OF THE CASE.

Defendant and his wife own and occupy a single family dwelling in Chicago, Illinois. In the basement of the residence was a recreation room, with closets built into the north wall. (A. 30-31).

On February 17, 1962, defendant and his wife left Chicago for a vacation. They returned on March 4, 1962. During their absence, defendant's brother, Leo Rugendorf, his sister, and one Roskin, a neighbor, all had keys to defendant's home for any necessary emergency entrance, service, mail removal or other purpose. (A. 30, 39).

On his return from his vacation, defendant resumed his business activity. He operated a meat market 19 miles from his residence. It was his practice to arise about 5:30 in the morning, spend the entire day in his store, and return to his home about 8:30 P.M. (A. 39-40).

Both defendant and his wife testified that at no time between their return from their vacation on March 4th and the defendant's arrest on March 22, did either have occasion to enter the closets in the basement. (A. 32, 40).

On March 22, an affidavit was filed by an F.B.I. agent before the United States Commissioner in support of an application for a warrant authorizing the search of the basement of defendant's residence. (A. 6-8). This affidavit recited:

(a) That the affiant had been informed that certain fur garments had been stolen in Alabama valued in excess of $5,000.

(b) That the affiant had been informed that a previously reliable informant had told another agent that certain persons, Schweihs, Panzica and Condic "were accom-

plished burglars who disposed of the proceeds of their burglaries through Leo Rugendorf," the brother of the defendant.

(c) That a previously reliable, unnamed confidential informant had told affiant on March 16, 1962, that he saw approximately 75 to 80 fur garments in the basement of the defendant's home, and had been told that the furs were stolen.

(d) That according to F.B.I. records, the only burglary of furs of this type of a value in excess of $5,000 during the past six months was the Alabama burglary.

(e) That still another agent, one McCormick, had told affiant that an unnamed previously reliable confidential informant had stated that Schweihs had committed the Alabama burglary.

(f) That McCormick had also told affiant that policeman James Kelleher said "that he saw Frank Schweihs at Rugendorf Brothers Meat Market managed by Samuel Rugendorf."

(g) That the same agent had told affiant that yet another unnamed previously reliable confidential informant had stated "that Leo Rugendorf was a fence for Frank Schweihs, that Samuel Rugendorf was Leo Rugendorf's brother and was associated in the meat business with his brother."

Based upon this affidavit, a search warrant was issued (A. 4-5) and served on defendant's wife. (A. 5). (Defendant, at the time, was at his place of business. A. 29). 82 furs were found in the basement closet. Defendant's wife expressed surprise, identified one of the furs as her own, and surrendered the remainder to the officers. (A. 16).

Defendant was thereupon arrested. He denied all knowledge and complicity. (A. 40-45).

Defendant moved to quash the search warrant and suppress the evidence, alleging that the affidavit was false and that it was insufficient to support a search. (A. 1-3).

The motion to quash and suppress, filed in advance of the trial, was heard at the conclusion of the prosecution case. (A. 17). The case for the prosecution consisted, in its entirety, in:

1. A stipulation that the Government exhibits were furs stolen in two separate thefts in Louisiana and Alabama, and were valued in excess of $5,000. (A. 15).

2. The testimony of F.B.I. agetn Moore that he executed a search warrant at defendant's home and found the furs there. (A. 15, 16).

At the commencement of the trial the defense requested the name of the confidential informant described in the affidavit for the search warrant as necessary to a proper defense or a proper attack of the search warrant. (A. 13). In support of this request, defense counsel stated that the identity was necessary to the defense because the informant, as a witness, would necessarily demonstate that the defendant had nothing to do with the crime, and that even the Government should be interested in calling the informant as a witness, since the informant obviously would have some knowledge as to whether the defendant was guilty. (A. 14). The Court denied this request. (A. 15).

At the hearing on the motion to suppress policeman Kelleher denied that he had stated that Rugendorf Brothers Meat Market was managed by the defendant. (A. 17).

Defendant testified that he was engaged in the grocery and meat business several miles from the Rugendorf Brothers Meat Market, with which he had no connection whatever. He had not been to the Rugendorf Brothers Meat Market for the past eight years. (A. 19).

An employee of Rugendorf Brothers Meat Market who had worked there for four years stated that he had never seen defendant at that place of business. (A. 21). Another witness, the manager of Rugendorf Brothers Meat Market since 1948, also testified that defendant had no connection with that business. (A. 21).

Defendant called F.B.I. agent Moore, as a witness, who testified that he was the agent in charge of the case and that he had had a conversation with the confidential informant. He was then asked "where did you have this conversation with this confidential informant?" The prosecution objected, stating that the Government could not reveal the name of the informant "because it would cause a possible murder." The objection was sustained. (A. 22).

Successive objections, assigning the same reason were sustained to each of the following questions:

"What is the name of this man?"

"Where is he now?"

"On what day did he say he saw the furs in the basement of the home of Sam Rugendorf?" (A. 22).

The defense argued that the statement that on March 16, informant stated that he had seen the furs "within the past week," left a substantial period of time during which the defendant's whereabouts would have to be accounted for, and that the defense sought to narrow the area of proof. Counsel further contended that the information was necessary to petitioner's defense. (A. 23).

The defense further argued that the affidavit for the search warrant had been proved to be false in two particulars, and that it was proposed to demonstrate, by the questions objected to, still further falsity. The Court, however, expressly foreclosed any further questioning of the witness Moore (A. 24), denied the motion to quash the warrant and suppress the evidence, and admitted the furs into evidence, ruling:

> "Even if part of the affidavit should be false, the main part of it, the material part, is true, because they actually found the garments there. Bring the jury." (A. 25).

The defense introduced evidence, not contested or rebutted, showing defendant's good reputation (A. 26-28) his absence from Chicago in February and March of 1962, and the holding during that period of keys to his residence by his brother Leo and others. Defendant and his wife both testified, denying any knowledge of the presence of the furs in their home and of any transaction relating thereto. (R. 30-34 and 37-45).

Defense motions for acquittal were denied (A. 9-10) and a judgment of conviction was entered on a jury verdict finding defendant guilty (A. 67). Defendant was sentenced to ten years' imprisonment.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

I.

Does the so-called "informer's privilege" against disclosure, extend to any matter not related to the identity of the informer?

If so, what is the limit of the reach of the privilege? And, does the privilege ever authorize the withholding of facts which might establish innocence?

* * *

Where a defendant has never before been arrested or charged with a crime; and where the defendant makes a strong and uncontested showing of previous good character and reputation; and where police testimony establishes that the defendant is not known to be engaged in any form of criminal activity; then,

May disclosure of the identity of an informant be withheld because of the prosecutor's unexplained and unsupported assertion that such disclosure "might and probably would" result in the informant's death?

* * *

May the disclosure of the identity of an informant, or other facts covering his activities, be compelled only if the informer is first proven to have been a moving party in the commission of the crime, and under no other circumstance whatever?

* * *

May the disclosure of facts relating to an informant be withheld in all proceedings wherein a defendant seeks to invalidate a search warrant obtained on information supplied by that informant, simply by reason of the nature of the proceedings and without regard to any other consideration whatever?

Without heat, and in the exercise of responsible and considered advocacy, we feel free to characterize the outcome of this litigation in the courts below, as an obvious and a terrifying injustice.

The holding of *Roviaro* v. *United States*, 353 U.S. 53, has generated a flurry of inventive activity in a search for mechanistic slogans designed to circumvent the effect of that decision.

The fate of the petitioner here is not the first consequence of that search. It will not be the last. But we know of no case which brings into sharper focus, the widespread mischief resulting from the quest for evasion of *Roviaro*.

In this aspect, police activity may have been self-defeating. It is a remarkable circumstance that at the very time when the government feels the strongest need to avoid compromise of the identity of its informants, it has experienced the misfortune of acquiring, on a nationwide basis, a legion of confidential sources so startlingly homogenous that any member of the group must be instantly recognizable by his peculiar characteristics.

For example, an informant, almost by definition, "has furnished reliable information in the past." (A. 8). This information may not have related to crimes. Numberless other subjects suggest themselves: weather, moral judgments, travel directions. But the information was always "reliable"—*i.e.*, the police believed it.

Another distinguishing feature of the informant is his paranoid dread of assassination. (A. 15). Neither the defendant's firmly established reputation for probity and honesty, nor the massed power of society organized for

his protection, will mitigate in the slightest degree the certainty of the informer's bloody doom, once his identity becomes known.

A third astonishing quality is the informant's ability to become privy to the darkest secrets of the underworld, while retaining complete integrity. Not only is his information consistently reliable, but it always relates to a crime in which he is not involved, so that his testimony could not possibly help the defendant. He is ". . . an informer and nothing more." *Miller* v. *United States*, 5 Cir., 1959, 273 F. 2d 279, 281. He has nothing to contribute ". . . to a fair determination of the cause." *United States* v. *Whiting*, 4 Cir., 1962, 311 F. 2d 191, 195. He did not help "to set up the commission of the crime and . . . was [not] present at its occurrence." *Jones* v. *United States*, D.C. Cir., 1959, 271 F. 2d 494, 496. We know these things about him, although nobody tells us so, because the defendant is unable to prove that the contrary is true.

The confidential informant also has an amazing talent for providing the very piece of information which is needed to be joined with other facts, in order to form the basis for a warrant. The warrant generates a search. The fruits of the search result in the defendant's imprisonment. Therefore, the informer's identity is not material, because it is "wanted in support of the effort to invalidate the search warrant." *United States* v. *Whiting*, 4 Cir., 1962, 311 F. 2d 191, 196.

The confidential informant is a remarkable fellow.

His name is "Anonymous". *Gilmore* v. *United States*, 5 Cir., 1958, 256 F. 2d 565, 566.

Infrequently, but often enough to be disturbing, he manifests his most remarkable quality of all: He does not exist. *United States* v. *Pearce*, 7 Cir., 1960, 275 F. 2d 318, 322.

Armed with these unique abilities, Anonymous has found it child's play to avoid the effect of your Honor's decision in *Roviaro*. If anything, *Roviaro* has had a therapeutic, an immunizing effect on Anonymous. The affliction, once felt in a mild form, cannot strike the organism again. Anonymous has learned his lesson, and has emerged with augmented vigor from his bout with legal cowpox, *virisque adquirit eundo*.

With his new-found powers, Anonymous has set his sights on far bigger game than *Roviaro*. His present ambition, already fulfilled in large part, is to render nugatory the Constitutional guarantees against unlawful search and seizure.

His confidences are reserved for policemen, so we are unable to say with certainty where he plans to go from there. But the destination is, we feel, readily to be predicted by any student of government.

• • •

Anonymous was enabled to condemn petitioner to ten years of imprisonment, by virtue of his power to invoke the characteristic of "immateriality" wherever convenient.

The government affidavits fairly scream the intelligence that Anonymous knows, not only who stole the furs, but who put them in the petitioner's basement. He knows whether petitioner is innocent or guilty. And for that reason, petitioner desperately sought to examine Anonymous.

It is perfectly clear from the government's affidavits, that not a syllable nor a punctuation mark need have been different if the informer had said that he himself had placed the furs in petitioner's basement without petitioner's knowledge.

In its effort to obtain the names of the informers, the defense told the court previous to the hearing on the petition, that it would demonstrate that certain matters in the affidavit were false (A. 13). The defense proved that an informant falsely said, as reported in the affidavit, that Sam Rugendorf was in the meat business with Leo Rugendorf. (See testimony of Cramsie and Siegel, A. 21.)

The defense proved the affidavit falsely said that officer Kelleher told agent McCormick that Sam Rugendorf managed the Rugendorf Meat Market. (See testimony of Kelleher, A. 17.)

The defense particularly sought the identity of the informant claimed in Moore's affidavit to have revealed to Moore the presence of furs in Sam's basement and the fact that such furs were stolen.

In denying the defense's request, the court observed that even if part of the affidavit were false the rest was true *because the garments were found there* (A. 25). In short, the court justified the search, not on the basis of the affidavit, but on the basis of what was found. But a search cannot be justified as lawful merely because it results in the disclosure of incriminating evidence. *United States* v. *DiRe*, 332 U.S. 581, 595. If the rule were otherwise, a petition to suppress could literally never succeed. Moreover, the trial court was mistaken in assuming the truth of that portion of the affidavit referring to the furs in the basement. The affidavit did not state as a fact that there were furs in the basement. The affidavit stated the fact to be that an unnamed person said there were furs in the basement. That is, the inquiry to be made in the hearing was not as to whether the furs were or were not there. The inquiry was to determine whether the agent was *told* the furs were there, as he said in his affidavit, and whether the person who gave the information, if he did, actually saw them there or was merely told they were there.

The defense was not even permitted to find out where the conversation between agent and informant took place, or the date the informant saw the furs in the basement, much less the informant's name (A. 22).

If a defendant is not permitted to inquire into the matters implicit in the affidavit in support of a warrant, he is deprived of his right to move to suppress the evidence. In this case, there is no reason to suppose that the confidential informant did not break into the basement at the direction of the government prior to the date of the warrant. In that case, the affidavit itself would follow as a product of an illegal trespass by the government, so that it could not support the issuance of a warrant. We do not say this happened. We do not know. But neither can the government now say to this Court that it did not happen.

The obvious way to have resolved such doubts was to permit a full hearing in the trial court. But a full hearing could not occur where the government took sanctuary as to the informant's name, and as to all of the events surrounding his activities.

In *Roviaro* v. *United States, supra,* 353 U.S. 53, your Honors held that the informer's identity, or the contents of his communication, must be disclosed where "relevant and helpful" to the accused or "essential to fair determination of the cause." (*Roviaro,* 60-61). Your Honors also acknowledged the practice of requiring the disclosure of an informant's identity in matters involving searches and seizures. (*Roviaro,* 61).

United States v. *Pearce,* 7 Cir., 275 F. 2d 318 demonstrated the necessity of the requirement that the government identify its informants in this situation. In *Pearce,* had the government not been required to identify its informant, the falsity of the agent's affidavit would never

have come to light and the defendants' conviction might then have been affirmed. But the informer's identity was revealed. His relation, or lack of it, to the agent was revealed, and the warrant collapsed for want of probable cause.

In the case at bar, however, the Seventh Circuit apparently adopted the new Fourth Circuit rule that disclosure of the identity of an informant cannot be compelled in any proceeding in which a search warrant is sought to be invalidated. In that behalf, the Court of Appeals cites *United States* v. *Whiting*, 4 Cir. 1962, 311 F. 2d 191, 196. The basis for such a rule is not apparent. Simply stated, it would mean that a defendant is entitled to know the identity of an informant only where he can show that such information will help him prove the substantive fact of his innocence. He cannot, however, obtain this information where its only effect would be to enable him to assert a fundamental constitutional right. This is fearful doctrine indeed. Basic liberties are preserved only by a concern for procedural safeguards. The Fourth Circuit rule (now apparently approved by the Seventh Circuit) would badly downgrade a procedural safeguard of explicit constitutional dimensions.

In *Costello* v. *United States*, 9 Cir., 298 F. 2d 99, 102, the court said, in part, "A reasonable opportunity for the appellant to challenge the reliability of the informant must be permitted on the motion to suppress, *or no real judicial check would over take place.* The refusal of the trial court, upon appellant's request, to require disclosure of the name of the informant under these circumstances was error." (Emphasis added.)

We urge that your Honors make it clear that the Ninth Circuit view, as expressed in *Costello,* is the correct one, and that the view of the Fourth Circuit as stated in *Whiting,* and as adopted by the Seventh Circuit here, is not constitutionally sound.

The defense in this case requested the informant's name and for permission to go into the facts as set out in the affidavit (A. 24). The trial court told defense counsel that he was *foreclosed* from touching upon those matters (A. 24), unless the government offered the informant as a witness (A. 23).

The government knew a good thing when it saw it. It did not offer the confidential informant as a witness.

We earnestly urge that where *all* of the material information in the affidavit came from confidential informers, once removed and twice removed; whole chains and relays of them; and where as here, *not one item* in the affidavit was based on affiant's personal knowledge, then the least that can be required of the government is that it make such disclosures as would permit the defense to probe. Here, the defense proved part of the affidavit false. In view of demonstration that certain parts of the affidavit were false, it seems probable that had defendant not been foreclosed, it might well have been shown to be false that an informant was ever actually in defendant's basement, as affiant claimed, or ever told the affiant agent that he had been there. And it seems equally probable that matters of substantially greater gravity, although of contrary import, might have been proven.

* * *

It is hoped that your Honors will take a serious view of the affidavit filed in support of the application for a warrant authorizing the search of petitioner's home. It

is further hoped that your Honors will take an even more serious view of the government's stated attitude toward the sanctity of its affidavit and the responsibility of its affiant.

F.B.I. Agent Marlin Moore swore before the Commissioner that on information and belief stolen furs affected with interstate commerce were in appellant's basement (A. 6). He based his belief (and the warrant issued) on certain "facts." Each such "fact" was hearsay. No "fact" was corroborated by any information within the personal knowledge of affiant.

The matters sworn to were:

(1) That an FBI agent in Alabama told affiant of an Alabama burglary on February 10, 1962, involving fur capes and stoles (A. 6-7).

(2) That a previously reliable informant relayed information to affiant, through another agent, that one Schweihs committed the Alabama burglary (A. 7).

(3) That police officer Kelleher relayed information to affiant through another agent, McCormick, that on March 1, 1962, he saw Schweihs at Rugendorf Bros. Meat Market, managed by defendant, at 2449 South Wentworth, Chicago (A. 7).

(4) That another previously reliable informant relayed information to affiant, through another agent, that defendant's brother, Leo Rugendorf, was a fence, and that Leo and defendant Sam were associated in the meat business (A. 7).

(5) That, yet another previously reliable informant told another agent who told affiant, that Schweihs and others were burglars and fenced goods with Leo Rugendorf (A. 8).

(6) That on March 16, 1962, an informer who had furnished reliable information in the past told affiant that he had seen 80 fur garments in defendant's basement a few days previously, describing them as mink, otter and beaver jackets, with labels removed (A. 8).

(7) That the same informant told affiant that he, the informant, "had been told" the furs were stolen (A. 8).

(8) That descriptions of all furs stolen in the United States valued in excess of $5,000.00 are reported to the FBI (A. 8).

(9) The affiant reviewed FBI files and the only burglary in excess of $5,000.00 in the United States in the preceding six months involving furs similar to those described by the confidential informant, were the furs taken on February 10 in Alabama (A. 8).

The court will observe that items 2 to 5 contain no facts from which wrongdoing on the part of the defendant, Sam Rugendorf, might be inferred. Those averments are merely a sermon whose underlying theology (horizontal corruption of the blood) urges that Sam Rugendorf must be stamped with criminality because his brother Leo was a reputed scoundrel.

Items 8 and 9 are inserted to create an inference that the furs in defendant's basement *must* have been taken from Alabama because the Alabama furs (which affiant never saw) were similar in description to those (which affiant never saw) described by the informant. And besides, the agent looked at his record and could not find any other burglaries in the preceding six months. Therefore assuming, in the absence of any facts whatever that the furs were stolen in the last 6 months, they had to be the Alabama furs.

Items 6 to 8 place furs in defendant's basement. There was nothing about the furs themselves that proclaimed a stolen character. But, said the sometimes reliable informant, he had been *told* that the furs were stolen. The informant did not divulge the source of his information. Whether the unidentified informant's unidentified informant had given "reliable information in the past" does not appear.

We do not contend that warrants cannot be based in part on hearsay. Thus, in *United States* v. *Guido,* 7 Cir. 251 F. 2d 1, it was held that affidavits in support of a warrant might consist partly in hearsay, provided other matters appeared of affiant's own knowledge. *Jones* v. *United States,* 362 U.S. 257, 271 concludes lingering doubts. Hearsay may provide part of the basis for a warrant if there was " . . . a substantial basis for crediting the hearsay." (*Jones,* 272).

In *Jones,* the policeman affiant swore to information personally known to him. His affidavit stated that the persons whose premises were to be searched for narcotics had previously admitted their drug addiction to him. And he had seen needle marks on their bodies. The informant had previously given accurate information, and his story was corroborated by other sources of information. (*Jones,* 271).

Thus, in *Jones,* the fact satisfied the standards imposed by the Court. The officer properly relied " . . . upon information received through an informant rather than upon his direct observations . . . [because] the informant's statement [was] reasonably corroborated by other matters within the officer's knowledge." *Jones* v. *United States,* 362 U.S. 257, 269. Similarly, in *Draper* v. *United States,* 358 U.S. 307, 313, probable cause ensued where information from an informer was corroborated by information based upon personal observations made by an agent.

Contrast the situation in the instant case. The informant was not corroborated by other information. He was corroborated by the agent's naked guess that the furs allegedly seen by the informant, but not by the agent guesser, were similar to those stolen in Alabama.

In *Jones* v. *United States*, 362 U.S. 257, the party to be searched was known by the police to be addicted to drugs. That fact, personally known to the officer affiant, rendered probable the notion that he might be likely to possess drugs as claimed by the confidential informer. In this case, defendant Sam Rugendorf was not known by the police, or by any agent of the FBI to have any personal characteristics which might render probable his commission of any offense whatever.

Lacking such collateral corroboration the agents hunted around for another "usually reliable" confidential informant from their list of such persons. They were lucky enough to find the very man for the job. Leo Rugendorf, he said, was a fence. And Sam Rugendorf was Leo's brother. And Sam was associated with Leo in the meat business.

The Commissioner was invited to hazard that defendant Sam, having made a conscious biological choice of the same parents selected by Leo, similarly selected Leo's moral standards. To demonstrate the likelihood that Sam followed the same illegitimate activities as Leo, the affiant claimed the confidential informant told him that Sam and Leo were together in the meat business.

The reliability of "usually reliable" confidential informants was shaken by Clarence Cramsie (A. 20) and Max Siegel (A. 21) both employed at the meat market, and both of whom testified without contradiction that Sam Rugendorf had never been in the market and had no interest in the business.

The reliability of relayed hearsay is punctured by agent Moore's affidavit that agent McCormick relayed a statement by officer Kelleher that Sam managed the meat market. For officer Kelleher testified that he did *not* tell McCormick that the meat market was managed by Sam (A. 7).

The government tendered a remarkable apologia in response to this uncontradicted proof that its affidavit was false. In its brief in the Court of Appeals, the government pointed out that the affidavit said that:

> " . . . Kelleher told McCormick that he saw Frank Schweihs at Rugendorf Brothers Meat Market, managed by Samuel Rugendorf . . . "

The government explained, in its brief (p. 18):

> " . . . (T)his portion of the affidavit does not state that Officer Kelleher told Agent McCormick that Sam Rugendorf managed Rugendorf Brothers Meat Market, but merely states that Kelleher had seen [Schweihs] at Rugendorf Brothers Meat Market . . . (T)he actual truth of such information is irrelevant when considering whether there was probable cause for the issuance of the warrant . . . "

And at last, the matter comes out into the open. How much faith can we have in any such affidavit? The document is merely a formality that must be observed in order to obtain a warrant. Like the phrase "very truly yours" at the end of a sales promotion letter, it is a ritualistic formula, a small part of a broad effort which must be judged only by its results. To examine it for truthfulness is unfairly to restrict the scope of this highly pragmatic art form. It is designed only to be signed, not read.

We will be equally pragmatic. The ultimate truth of this case was, we feel, unconsciously disclosed by the prosecutor when he claimed that disclosure of any fact

concerning the informant—even the place where he spoke to the policeman—"would cause a possible murder." (A. 22)

Relying completely upon the prosecutor's sense of responsibility, we must presume that this was not a mere catch phrase, designed to elicit visceral indignation at the sacrifice of legal principle.

Very well, then. Anonymous would probably be murdered if the court were told the date on which he saw the furs in petitioner's basement (A. 22). But murdered by whom? Certainly not by petitioner, who has never in his 55 years been suspected of any form of illegal activity, much less of murder.

Yet, the informant would be murdered if identified. And *Leo,* petitioner's brother, is a known fence and associate of hoodlums, from whom, presumably, such violence is to be expected.

At best, then, petitioner is being punished for being Leo's brother. The government did not invoke its privilege on the basis of materiality, but on the basis of fear for the life of the informant. Had petitioner not been Leo's brother, he could probably have found out who put the furs in his basement.

At worst, and more probably, petitioner is being punished for a crime which someone else very probably committed. The government agent has sworn in his affidavit, for what that is worth, that the furs were stolen by certain of Leo's associates. Leo had unrestricted access to petitioner's home for several weeks during petitioner's vacation, shortly prior to the discovery of the furs. He went to petitioner's neighbors and told them not to worry if they saw people in petitioner's home during the vacation, and not to call the police (A. 28).

But the prosecution had evidence only against petitioner. He was very probably innocent, but he could be used as a means of reaching Leo. It would be possible to prosecute him, punish him severely (he is, after all, a Rugendorf), and force Leo to admit his guilt out of concern for his brother.

Of course, such reasoning depends, for its effectiveness, upon the possession by Leo of a sense of moral responsibility far superior to that of the police authorities. In the final analysis, however, we must accept the prosecutor's evaluation of this aspect of the case, just as with all other facets of the litigation.

• • •

II.

May a conviction on a charge of receiving stolen property, Title 18 U.S.C. Sec. 2315, be predicated entirely and solely upon proof that stolen property was found on premises partially owned and partially occupied by defendant, but to which a number of others also had access?

It has never been expressly decided that one who violates Section 2315 by receiving, concealing, or storing stolen property, must do so knowingly. But if knowledge was an issue in this case, certain it is that there was no shadow of evidence on that issue.

Petitioner came into court with a background of hard and honest work, and a spotless reputation, achieved over a span of 55 years.

The government came into court with a stipulation that furs valued at more than $5,000.00 had been stolen outside Illinois, and with proof that they had been found concealed in petitioner's basement.

This was the government's entire presentation before the jury. And it must be judged in the light of certain highly relevant and uncontested facts. The defendant and his wife were absent from Chicago on vacation for a period of two weeks, beginning about one week after the completion of the theft. (A. 30, 39.) They left keys to their home, for emergency purposes, with a number of people: their son; petitioner's sister; a neighbor (A. 30, 39). They also left a key with petitioner's brother, Leo (A. 30, 39). And Leo was a "fence". (A. 30)

The day following petitioner's departure, Leo came into the neighborhood. He told a neighbor, Mrs. Lamm, not to worry if she saw lights in petitioner's house, because he, Leo, had a key (A. 28).

An agent and affiant for the government took solemn oath that he had reliable information that the furs had been stolen by criminal associates of Leo, and that Leo's function was to dispose of goods stolen by the thieves. (A. 7, 8)

There is no evidence that petitioner ever saw the furs prior to his arrest. There is no evidence generating so much as an inference that he knew they were in his basement.

The Court of Appeals' opinion which we ask your Honors to review, suggests that material fact issues were presented to the jury. The record will not support that assertion. The only evidentiary conflict was whether Leo had returned the keys when petitioner returned from his vacation. The government urges that the jury resolved this issue against petitioner, and argues that it is illogical to believe:

> " . . . that Leo would have placed the furs in the basement and then given away his only means of taking the furs out of the basement by returning the key to defendant . . . " (Government brief in Court of Appeals, p. 7)

The Court of Appeals has elevated this argument to the dignity of plurality, by its reference to "stubborn *facts* plainly pointing to [petitioner's] guilt."

The patent impossibility of copying a residence key at any price less than 25¢, imparts to that argument such cogency as your Honors may deem it to possess.

Not only is it far more probable that Leo is the offender; it is the simple, if absurd, fact that the case against petitioner's wife is much stronger than the case against petitioner. Petitioner's wife managed the home, and lived there throughout the day (A. 32). Petitioner merely slept there, on the normal working day (A. 39).

Assuredly, petitioner's wife is no more guilty than petitioner. The real offender was almost certainly Leo, or some other person known to the nameless informant whose identity was guarded from petitioner's inquiries. But a much stronger case, although still inadequate to support conviction, could have been made against petitioner's wife, than was made against petitioner.

The outcome of this litigation to this time cannot be pleasant to petitioner's wife. But she may at least take solace in the fortunate circumstance that she was not born as Leo's sister.

• • •

If Section 2315 requires that the concealment or storage of stolen goods must be knowingly done in order to be criminal—and this is the obvious intent of the Statute—this would be an exceptionally felicitous occasion, from Petitioner's standpoint, for the clarification of that principle.

If Section 2315 does not so require, it would likewise be helpful if that fact were made clear, in order that the citizenry may be alerted to the necessity of periodic and systematic inspections by them of their residences, business quarters and vehicles to assure that all is in readiness if the police should come.

And if being the brother of a suspected criminal, entitles the government to use one as a pawn in the "war against crime", it is high time we all stopped pretending to the contrary, and abandoned our time-wasting academic discussions concerning individual rights and dignity.

CONCLUSION.

We respectfully submit that no more obvious miscarriage of justice is likely to come before your Honors, than the case here sought to be reviewed. We further doubt that your Honors are prepared to countenance the glib slogans which have been used as a pretext to deny to petitioner the right to demonstrate his innocence. The "informer privilege" has here been carried to the point where it has effectively circumvented the Constitutional privilege to know and confront one's accuser, and to be safe against unreasonable search.

We pray that your Honors will consider this a fit case to warrant this Court's attention.

Respectfully submitted,

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Attorneys for Petitioner

APPENDIX "A"

In the

United States Court of Appeals

For the Seventh Circuit

No. 13967 SEPTEMBER TERM 1962—APRIL SESSION 1963

UNITED STATES OF AMERICA,
Appellee,
v.
SAMUEL JOSEPH RUGENDORF,
Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

April 30, 1963

Before DUFFY and KNOCH, *Circuit Judges,* and MERCER, *District Judge.*

DUFFY, *Circuit Judge.* Defendant was tried before a jury and was convicted of receiving, concealing and storing goods, wares and merchandise of a value in excess of $5,000, knowing the same had been stolen and transported in interstate commerce in violation of Section 2315, Title 18, United States Code. The goods were identified in the indictment as 81 fur pieces which had been stolen in Shreveport, Louisiana and Mountain Brook, Alabama, and which had moved in interstate commerce from Shreveport and Mountain Brook to Chicago, Illinois.

On this appeal, defendant argues (1) the evidence was insufficient to sustain the verdict of guilty; (2) the trial court erred in overruling defendant's motion to suppress the evidence, and (3) the trial court erred in refusing to require the government to reveal the source of the information contained in the affidavit, pursuant to which a search warrant was issued.

Defendant and his wife owned and occupied a two-story brick, single family dwelling in the City of Chicago. The basement was partitioned into two sections by a wall running east and west. The rear or south part contained two smaller rooms, one of which was a laundry and furnace room, and the other a general storage room. In the northern section, there was a nicely finished recreation room. At the east wall of this room there was a business-type desk with a telephone. In the center of the room was a card table and sewing machine. There were closets built into the north wall. During the search, Agent McCormick opened the doors to these closets, and in the last one discovered 81 furs hanging on individual wire hangers which hangers were on a rod that extended the length of the closet. The labels had been torn out of the garmens. There were, in fact, 82 fur pieces, but Mrs. Rugendorf, the wife of defendant, identified one of the fur pieces as belonging to her.

Defendant's wife testified that she and her husband left Chicago on the evening of February 17, 1962, for a vacation in Florida and Nassau; that they returned to Chicago on March 4, 1962; that during the period of their absence, her brother-in-law, Leo Rugendorf, her son, her sister-in-law and one Roskin all had keys to the house. She testified the defendant did not go into the basement between March 4, and March 22. The defendant gave similar testimony and in addition testified he had no occasion prior to

February 17, 1962, to go to the basement or to look at the closets. There also was testimony that defendant's brother, Leo, was a well-known "fence."

There is no dispute that on March 22, 1962, agents of the Federal Bureau of Investigation found in the basement of defendant's home, the loot of two burglaries, one of which occurred at Shreveport, Louisiana, December 4 and 5, 1961, and one at Mountain Brook, Alabama, on February 10, 1962.

There were a number of conflicts in the evidence which the jury was entitled to and did resolve. To illustrate, defendant testified that before he left on his vacation, he gave the key to his house to his brother Leo and that the key had not been returned. Agent Lee testified that when defendant was arrested he stated that Leo came into defendant's place of business shortly after he had returned from Florida and returned the key to him.

The situation in the case at bar is somewhat similar to that in *United States* v. *Mann*, 7 Cir., 108 F. 2d 354, 358, where we said: "Here, the jury rejected defendant's professions of innocence in the face of stubborn facts plainly pointing to his guilt."

Knowledge of the stolen character of the goods may be established by circumstantial evidence. *United States* v. *O'Brien*, 7 Cir., 174 F. 2d 341; *United States of America* v. *Allegrucci*, 3 Cir., 258 F. 2d 70.

We hold that the evidence, viewed in the light most favorable to the government, clearly supports the conviction of the defendant.

Defendant argues that the affidavit which was the basis of the issuance of the search warrant was based on hearsay information and therefore insufficient. Defendant relies upon *Jones* v. *United States*, 362 U. S. 257.

Agent Moore of the F. B. I. swore that an informer who had furnished reliable information in the past reported to affiant that he had seen 30 fur garments in defendant's basement a few days previously, describing them as mink, otter and beaver jackets, with labels removed, and that the informant had been told the furs were stolen.

We think defendant's reliance upon *Jones* v. *United States, supra,* is misplaced. We quote the following from the opinion in that case (pages 270-271): ". . . In a doubtful case, when the officer does not have clearly convincing evidence of the immediate need to search, it is most important that resort be had to a warrant, so that the evidence in the possession of the police may be weighed by an independent judicial officer, whose decision, not that of the police, may govern whether liberty or privacy is to be invaded.

"We conclude therefore that hearsay may be the basis for a warrant. We cannot say that there was so little basis for accepting the hearsay here that the Commissioner acted improperly . . . But there was substantial basis for him to conclude that narcotics were probably present in the apartment, and that is sufficient. . . ."

In *United States of America* v. *Eisner,* 6 Cir., 297 F. 2d 595, 596, the Court, relying on the *Jones* case, upheld the sufficiency of an affidavit which stated " 'Informaiton has been obtained by S. A. Clifford Anderson, F. B. I., Cincinnati, Ohio, which he believes to be reliable to the effect that Sam Eisner received furs which were a part of the loot from the Davidson Indiana Fur Co. in Ky., after they had been transported from Indianapolis, and had knowledge that they had been stolen.' " It will be noted that the affidavit in the case at bar is quite similar to that approved in the *Eisner* case.

We hold there was no abuse of discretion on the part of the Commissioner in issuing the search warrant. There was present a sufficient basis for the determination by the Commissioner of the existence of probable cause.

The remaining point raised by defendant as error is the refusal of the trial court to require the disclosure of the name of the informer. The defendant relies on *Roviaro* v. *United States,* 353 U. S. 53.

At the trial, when the prosecutor refused to disclose the name of the informer, he stated the ground of his objection was "because it would cause a possible murder." Involved here is what has often been termed the "informer's privilege." However, it is the privilege, if any, of the government to withhold the names of persons who have supplied information leading to the detection of crime and the apprehension of the criminal.

The Supreme Court, in the early case of *In re Quarles and Butler,* 158 U. S. 532, 535-536, stated: " . . . and such information, given by a private citizen, is a privileged and confidential communication, for which no action of libel or slander will lie, and the disclosure of which cannot be compelled without the assent of the government. . . ."

However, an exception to this rule was stated in *Roviaro* v. *United States,* 353 U. S. 53, 60-61. The Court there held that when the disclosure of the name of the informer is "relevant and helpful to the defense of an accused, or is essential to a fair determinaiton of a cause, the privilege must give way." The Supreme Court further stated in *Roviaro* v. *United States, supra,* at page 62: "We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. . . ."

In *Roviaro*, the informer was the only person, other than the defendant, who participated in the transaction charged in the indictment. He was the only witness other than the defendant who could have disclosed entrapment, if any.

In *Jones* v. *United States of America*, DC Cir., 271 F. 2d 494, 496, fn. 3, cert. den. 362 U. S. 918, the Court had for decision the question of whether it was error to fail to disclose the name of the confidential informant, when it was his information, relayed through another agent, that was the basis of establishing probable cause. The Court there said that *Roviaro* was applicable only when the informer "*'helped to set up the commission of the crime and . . . was present at its occurrence.'* . . .(Emphasis added.)"

The Courts of Appeal of several Circuits have considered the reach of Roviaro but have, nevertheless, upheld the action of trial courts in refusing to compel the government to disclose the name of the confidential informant.

In *Miller* v. *United States of America*, 5 Cir. (1959), 273 F. 2d 279, cert. den. 362 U. S. 928, the trial court had refused to require the government to disclose the name of the informant who had furnished the information giving the officers probable cause to arrest without a warrant. The Court of Appeals discussed *Roviaro* and also *Gilmore* v. *United States of America*, 5 Cir., 256 F. 2d 565, and stated at page 281: "We think that the circumstances of this case differs crucially from those cases in which disclosure was required. We hold that it was not error to refuse to require the Government to divulge the identity of its source of information . . . We are not dealing with one who was an active participant in the crime . . . and one who would have been able to testify directly about the very transaction constituting the crime . . . We think all the evidence discloses is that the informer was an informer and nothing more."

In a recent case, the Fourth Circuit, in *United States of America* v. *Whiting*, 311 F. 2d 191 (1962), refused to compel the government to disclose the name of a confidential informant who had furnished information leading to the obtaining of a search warrant. The Court said at page 196: "In the present case, however, we have no such situation for, as the attorney for the defendants admitted, the names of the informers were wanted in support of the effort to invalidate the search warrant and not to help the defendants in the presentation of their case."

We hold it was not error for the trial court to refuse to compel the government to disclose the name of its confidential informant.

AFFIRMED.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX "B"

In the

United States Court of Appeals

For the Seventh Circuit

Chicago 10, Illinois

Friday, May 24, 1963

Before

Hon. F. Ryan Duffy, Circuit Judge
Hon. Win G. Knoch, Circuit Judge
Hon. Frederick O. Mercer, District Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 13967 vs.

SAMUEL JOSEPH RUGENDORF,
Defendant-Appellant,

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby Denied.

APPENDIX "C"

In the

United States Court of Appeals

For the Seventh Circuit

Statutes Involved.

Title 18 United States Code, Section 2315, provides in relevant part:

> "Whoever receives, conceals, stores, barters, sells or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of $500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken • • •
>
> • • •
>
> "Shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 223

SAMUEL JOSEPH RUGENDORF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 316 F. 2d 589.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1963. A petition for rehearing was denied on May 24, 1963 (Pet. App. B). The petition for a writ of certiorari was filed on June 21, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the trial court properly refused to disclose the name of the confidential informant whose information that he had seen furs in the basement of petitioner's apartment was relied upon in the affidavit for a warrant to seize the furs.

2. Whether there was sufficient evidence to support the verdict.

STATUTE INVOLVED

18 U.S.C. 2315 provides in pertinent part:

> Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities of the value of $500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken; * * *
>
> * * * * *
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

STATEMENT

Following a jury trial held in the United States District Court for the Northern District of Illinois, petitioner was convicted on an indictment charging a violation of 18 U.S.C. 2315, *supra*, in that he unlawfully received, concealed and stored 81 stolen

fur pieces, which had been transported in interstate commerce and had a value in excess of $5,000, with knowledge that the furs had been stolen (R. 1, 67).[1] Petitioner was sentenced to imprisonment for a term of ten years; the trial judge, invoking the provisions of 18 U.S.C. 4208(a)(1), recommended that he be paroled after serving a minimum prison term of two years (R. 12). The court of appeals unanimously affirmed (Pet. App. A; 316 F. 2d 589).

1. Petitioner filed a pre-trial motion to suppress evidence seized from his premises under a search warrant, alleging that the supporting affidavit was inadequate in that it was not based upon the personal knowledge of the affiant but upon "unsupported hearsay" (R. 2-3). Following argument of counsel, the court found the affidavit sufficient because based on information obtained from reliable informants (Tr. 9-21). At the trial, after the government's case in chief had been presented, an evidentiary hearing on the suppression issue was held, and the motion was denied (R. 17-25). The court also denied the defense request for the names of the confidential informants whose information had been relied upon in the affidavit for the search warrant (R. 14-15, 22-24). The pertinent facts relating to these matters are as follows:

a. The affidavit for the search warrant, executed on March 22, 1962 by F.B.I. agent Marlin Moore,

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[1] "R." designates the "Appendix for Appellant" in the court of appeals which is now on file with the Clerk of this Court. "Tr." refers to the two-volume trial transcript which is lodged herewith.

stated that the agent had reason to believe that some 80 fur garments having a value of approximately $40,000, which had been stolen in Mountain Brook, Alabama, on February 10, 1962, were concealed in the basement of a single-family residence at 3117 West Jarvis Avenue, Chicago, Illinois (R. 6-7). The affidavit set forth the basis for the agent's belief in pertinent part as follows (R. 8):

> * * * a confidential informant who has furnished reliable information in the past to the Federal Bureau of Investigation told this affiant, on March 16, 1962, that he saw approximately 75 to 80 fur garments in the basement of the home of SAMUEL RUGGENDORF at 3117 West Jarvis Avenue, Chicago, Illinois, within the past week and described these fur garments as mink, otter, and beaver jackets and stoles, the most of which were mink, and that the labels had been removed from said fur garments; further, that there were no full length coats, and that the informant had been told the furs were stolen.

The affidavit concluded that the affiant had examined reports of all fur burglaries reported to the F.B.I. exceeding $5,000 for the prior six months and that the furs described by the informant fit the description of the furs stolen on February 10, 1962, at Mountain Brook, Alabama (R. 8).[3]

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[3] The earlier portions of the affidavit stated, *inter alia*, that another confidential and reliable informant had told the F.B.I. that the fur burglary in Alabama had been committed by one Frank Schweihs and others; that other reliable informants had advised that Leo Rugendorf (petitioner's brother) was a "fence" for Schweihs; that petitioner was

b. Before the commencement of the trial, defense counsel requested the names of the informants referred to in the affidavit (R. 13-14). The government objected that if it were "to reveal the name of any informants they might and probably would be killed" (R. 15). After argument of counsel, the trial judge denied the defense motion (R. 15). Thereafter, at the evidentiary hearing on the motion to suppress, defense counsel sought to question agent Moore as to the identity of the informer who had reported seeing the furs in petitioner's basement, the place that the agent had conversed with the informer about these matters, and the date that the informer said he had seen the furs (R. 22-23). The court sustained the government's objections to these inquiries based on its claim that the answers would lead to the disclosure of the identity of the informant and to his "possible murder" (R. 23, Tr. 119). The court pointed out that "[i]f the Government ever offers that confidential informant as a witness, you will be certainly fully informed" (R. 23; see also Tr. 129).[3]

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associated in the meat business with his brother, and that Schweihs and his accomplices were "accomplished burglars who disposed of the proceeds of their burglaries" through Leo Rugendorf (R. 7-8). The affidavit further stated that Chicago police officer James Kelleher had informed the F.B.I. on or about March 1, 1962, that he had seen Schweihs at Rugendorf Brothers Meat Market, "managed by" Samuel Rugendorf (R. 7).

[3] At the hearing, petitioner sought to show factual errors in the affidavit. To this end, he called Chicago police officer Kelleher who testified that while he had informed an agent

2. The government's trial evidence showed that 81 fur pieces taken in two burglaries—one at Shreveport, Louisiana in December 1961, and the other at Mountain Brook, Alabama in February 1962—were found in a closet located in the finished basement of petitioner's one-family house on March 22, 1962. It was stipulated at the commencement of the trial that the furs found on petitioner's premises were the stolen furs and that they had a value in excess of $5,000 (R. 15). Agent Moore, who executed the search warrant on that date, stated that the furs were found hanging on individual wire hangers on a rod running the length of the closet and that one of the furs in the closet was identified by Mrs. Rugendorf as her own (R. 16, 31, Tr. 36, 55).[4] According to the agent, on the adjacent basement floor were three large white bags (about four feet deep and two feet in diameter), into which some of the seized furs were packed (R. 15-16, Tr. 52-58). The basement contained, among other things, a laundry room, a desk, telephone, card table and sewing machine (R. 16).

The defense at the trial was that neither petitioner nor his wife knew how the furs got into the basement

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of the F.B.I., on March 1, 1962, of having seen Schweihs at the Rugendorf Brothers Meat Market, he had not told the agents that the Market was managed by petitioner (R. 17; see *supra*, pp. 4-5, n. 2). Petitioner testified that he ran his own meat and grocery store; that for the past ten or eleven years he had had nothing to do with Rugendorf Brothers Meat Market; and that he had not been there for the previous four years (R. 18-20; see also R. 20-21).

[4] Mrs. Rugendorf testified at trial that while she had told the agent the fur was hers, it actually belonged to her sister-in-law (R. 36, Tr. 229).

closet or knew that they were there until they were seized by the F.B.I. Both petitioner and his wife testified that they had vacationed in Florida from February 17 until March 4 and that, from the date of their return until the execution of the warrant, they had no occasion to look into the closet (R. 30-32, 40). Mrs. Rugendorf further testified that before leaving on vacation she had taken some summer clothing out of the closet and no furs were then there (R. 31, 34); that, although she had been in the basement following the return from vacation, she had no occasion to look in the closet (R. 31; Tr. 232-233); that she had never seen the three white bags into which the agents had packed some of the furs; that these bags were found in the closet with the furs, not as Agent Moore claimed in open view on the floor of the basement (R. 33, 36; Tr. 213-215, 230-232).

Petitioner testified that he had never put the furs in the closet, did not know how they got there and did not know they were there (R. 40). Both petitioner and his wife further stated that, before going on vacation, a key to the premises had been given to petitioner's brother, Leo, and that he had never returned it (R. 30, 36, 39, 40, 45).[5] The defense attributed the presence of the furs in the basement closet to the activities of Leo (See Tr. 536-537, 545-546, 554).[6]

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[5] Three other individuals also had keys to petitioner's house at this time (R. 26-27, 30).

[6] Chicago police officer James Kelleher testified that Leo Rugendorf was known to him as a receiver of stolen property (R. 30).

In rebuttal, agent Moore again testified that, at the time of the seizure, the three white bags were found on the floor of the finished portion of the basement and not, as Mrs. Rugendorf said, in the closet with the furs (R. 39, 62). Agent Lee testified that petitioner, following his arrest, had told Lee that, shortly after his return from Florida on March 4, Leo had returned the house keys (R. 64).[1]

ARGUMENT

1. The privilege of the government to keep its sources secret and thereby encourage the steady and unimpeded flow of information necessary to effective enforcement of the criminal law yields only in the exceptional case where disclosure of an informant's identity is essential to the defense of the accused. *Roviaro* v. *United States*, 353 U.S. 53, 59-62; *Scher* v. *United States*, 305 U.S. 251; 254. This is not such a case.

a. Petitioner argues that the identity of the informant who advised agent Moore that he had seen the furs in petitioner's basement was necessary to challenge the sufficiency of the affidavit supporting the search warrant. It is, however, established that a warrant may be based on information given by in-

[1] Permeating the testimony of petitioner and his wife was the claim that the F.B.I. agents told them that if they admitted that Leo had put the furs in the basement petitioner would be set free (See *e.g.*, R. 33, 41-46). On the other hand, the agents testified that petitioner and his wife sought to place on Leo all responsibility for the furs being in the basement (R. 61-62, 63-64).

formers known to be reliable without requiring "the informants or their affidavits to be produced". *Jones* v. *United States*, 362 U.S. 257, 272. Petitioner misconceives the thrust of *Jones* in arguing that an affidavit based entirely on hearsay is insufficient to support a search warrant. While it is true that in *Jones* there was more to justify relying upon the information than the fact that the informers had given accurate information in the past, there is nothing in this Court's opinion indicating that this alone would not be a sufficient basis for finding reliability. Moreover, as the Court observed, the affidavit "rested wholly on hearsay" (362 U.S. at 269), and "hearsay may be the basis for a warrant" (*id.* at 271), "so long as a substantial basis for crediting the hearsay is presented" (*id.* at 269). Information provided by one who has provided accurate information in the past is entitled to such credit. *United States* v. *Prince*, 301 F. 2d 358, 359 (C.A. 6); cf. *Espinoza* v. *United States*, 278 F. 2d 802 (C.A. 5), certiorari denied, 364 U.S. 827.[8]

Disclosure of an informant's name is required only where it is essential to the "individual's right to prepare his defense". *Roviaro* v. *United States*, *supra*, 353 U.S. at 62. It would be particularly inappropriate to disclose the name of the informant in this case, for the right to seize property reasonably believed to be stolen does not depend on the guilt or innocence of

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[8] In this case, the affiant (F.B.I. agent Moore) swore that the confidential informant who told him of the location of the furs "has furnished reliable information in the past to the Federal Bureau of Investigation" (R. 8).

the owner of the premises where the stolen property is reportedly located. The only question with respect to the search warrant is whether there was support for the deliberate, impartial judgment of a judicial officer that there was reason to believe that stolen furs were in the basement. This decision is based upon information on which "reasonable and prudent men, not legal technicians, act". *Brinegar* v. *United States*, 338 U.S. 160, 175. The information here, coming from a man known to have been reliable in the past, coupled with the reports of known robberies involving similar furs, did furnish probable cause for a warrant to recover stolen goods. See *United States* v. *Whiting*, 311 F. 2d 191, 196 (C.A. 4), certiorari denied, 372 U.S. 935.[9]

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[9] In *Roviaro* v. *United States*, *supra*, 353 U.S. at 61, this Court observed that most of the cases involving a limitation on the informer's privilege "have arisen where the legality of a search without a warrant is in issue and the communications of an informer are claimed to establish probable cause. In these cases the Government has been required to disclose the identity of the informant unless there was sufficient evidence apart from his confidential communication [citations omitted]". Whatever the continuing general vitality of this language on the scope of the privilege in view of this Court's later rulings that a law enforcement officer may, without a warrant, arrest wholly on reliable hearsay (See *Draper* v. *United States*, 358 U.S. 307, 311-312; *Jones* v. *United States*, *United States*, 358 U.S. 307, 311-312; cf. *Jones* v. *United States*, *supra*, 362 U.S. at 270), it has, in any event, no bearing here since the law enforcement activity was based upon a warrant. Nor is the decision in *United States* v. *Pearce*, 275 F. 2d 318 (C.A. 7), to the contrary. There, the information provided in the affidavit was from a "stranger" to the enforcement officers who never had given reliable information in the past and, consequently, involved a situation where there was no basis for crediting the hearsay information (see 275 F. 2d at 321-323).

There is no basis for petitioner's claim that, having shown misinformation in the other portions of the affidavit, he should have been allowed to test the informer's story to show it was also erroneous. The purported false information—that the affidavit stated that Chicago police officer Kelleher had informed the F.B.I. that he had seen the person (Schweihs) suspected of the theft at Rugendorf's Brothers Meat Market, "managed by Samuel Ruggendorf" (R. 7), whereas the officer testified that he had never stated anything to the F.B.I. concerning petitioner's association with the Market (R. 17)—is not necessarily false at all. A fair reading of this portion of the affidavit does not compel the conclusion that it was officer Kelleher who informed the F.B.I. that petitioner managed the market. Beyond this, the information had nothing to do with the unequivocal statement of the informer that he had seen the furs in the basement of petitioner's home. Cf. *Chin Kay* v. *United States*, 311 F. 2d 317, 321 (C.A. 9). While the trial court may have been overly cautious in prohibiting defense counsel from asking agent Moore where he had spoken to the informant and the exact date that the informer had told him he had seen the furs (R. 22-23), the court's judgment in this regard was based on the government's fear that responses to these questions might result in disclosure of the informer's identity and his "possible murder" (R. 22). Assuming the government's right to protect the identity of the informant, it was well within the court's discretion in these circumstances to exclude

any questions, the responses to which might reasonably be considered to provide a clue to identity.

b. To the extent that petitioner's argument goes further and suggests that the identity of the informant was somehow essential to his defense at trial, it also must fail. The basic issue at trial was whether petitioner knew that stolen furs were concealed in his basement.[10] Even if, as petitioner suggests, the confidential informant might have been able to testify as to who stole the furs or how they came to rest in petitioner's basement closet, this would not go to the issue of petitioner's knowledge. In other words, this is not a case like *Roviaro, supra,* in which the informer had contrived and played a direct and prominent part in the very offense for which the accused was convicted. See, to similar effect, *Gilmore* v. *United States,* 256 F. 2d 565, 566-567 (C.A. 5). In this case, whether or not there is merit to petitioner's surmise that the informant knew of the circumstances of the theft or could reveal who put the furs in the closet, there is nothing to indicate that the informant participated in or had any relationship to the crime of which petitioner stands convicted. In this setting, the interest of the government in protect-

[10] In its charge to the jury, the trial court pointed out that the government did not have to prove "all three allegations, to wit, that the defendant did receive, conceal and store the furs" set out in the indictment. To support the conviction, the court continued, "It is sufficient if the Government proves any one of the three * * * for example, that the defendant did receive or did conceal, or did store the stolen furs, alleged in the indictment. Of course, with the element of knowledge" (Tr. 574).

ing its channels of information should override a speculative claim that an informer's possible knowledge of events preceding an accused's criminal activity requires disclosure of his identity. See *Miller* v. *United States*, 273 F. 2d 279, 280-281 (C.A. 5), certiorari denied, 362 U.S. 928; *Mosco* v. *United States*, 301 F. 2d 180, 189 (C.A. 9), certiorari denied, *sub nom. Hansen* v. *United States*, 371 U.S. 842; *Jones* v. *United States*, 271 F. 2d 494, 496, n. 3 (C.A.D.C.), certiorari denied, 362 U.S. 944; *Bruner* v. *United States*, 293 F. 2d 621, 622-623 (C.A. 5), certiorari denied, 368 U.S. 947.

3. Little need be said concerning the sufficiency of the evidence. The undisputed facts showed that 81 stolen furs of a value in excess of $5,000 were found stored in a closet in petitioner's basement[11] and that they had been there for a number of weeks prior to the seizure on March 22. The defense at trial was that these furs were placed in the closet unbeknownst to petitioner while he and his wife were on vacation (from February 17 until March 4) and that they had no occasion to look into the closet after their return home. Opposed to this was evidence that a personal fur piece was, at the time of the seizure, in the very same closet; that clothing used on the vacation had been taken from this closet; and that the furnished basement area adjacent to the closet was in general use by the occupants. Considering these factors together with testimonial conflicts that could be fairly

[11] At the outset of the trial it was stipulated that these furs had a value in excess of $5,000, had been stolen in Louisiana in December 1961 and Alabama in February 1962 (R. 15).

resolved in the government's favor—*e.g.*, that petitioner had lied when he claimed that his brother Leo never returned his house keys, and that petitioner's wife had misstated the location of the three large white bags found by the agents when they seized the furs—the jury could properly infer that petitioner knew of the presence of the recently stolen furs and that he was storing them in his closet with knowledge of their stolen character. See *Wilson* v. *United States*, 162 U.S. 613, 619-620. There is no occasion for this Court to review the concurrent findings of the courts below that the evidence supports the verdict. *Delaney* v. *United States*, 263 U.S. 586, 589-590; *United States* v. *Johnson*, 319 U.S. 503, 518.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1963.

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No. 223

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

SAMUEL JOSEPH RUGENDORF,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Reply Brief for the Petitioner

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IN THE

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SAMUEL JOSEPH RUGENDORF,

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UNITED STATES OF AMERICA,

Respondent.

Reply Brief for the Petitioner

In opposition to our petition for certiorari, the respondent has filed a brief which does not fairly meet the points presented by petitioner.

With the court's indulgence we will address ourselves briefly to both of the points made by respondent.

I.

THE IDENTITY OF THE INFORMANT

The respondent's arguments on the informer issue may appropriately be elevated, rather than reduced to absurdity.

First, the government addresses itself to the proven falsity of that portion of the agent's affidavit which said, "... Kelleher told McCormick that he saw Frank Schweihs at Rugendorf Brothers Meat Market, managed by Samuel Rugendorf ..." The government makes bold to suggest that this affidavit has not been proven false, notwithstanding the absolute certainty that petitioner *did not* manage the meat market. They solemnly assure Your Honors as follows: (Gov't. Br., p. 11), "A fair reading of this portion of the affidavit does not compel the conclusion that it was officer Kelleher who informed the F.B.I. that petitioner managed the market."

The disavowal by the government of all inferences which their affidavit does not "compel" is quite novel to these proceedings. At all earlier stages, the government has asked for and received the benefit of all the averments of the affidavit plus all fair intendments of the language thus used. In fact, in the paragraph preceding the quoted assertion, the government argues that the affidavit is to be construed in accordance with the understanding of, "reasonable and prudent men, not legal technicians."

The government, throughout its brief, flits from side to side of every issue with the agility of Stephen Leacock's horsemen, who somehow contrived to "dash madly in all directions." The foregoing is a fair example of the technique. Many others are available.

For example, the government argues, at pages 9 and 10 of its brief, that the right to seize stolen property does not depend upon the guilt or innocence of the person from whom they are seized. Thus, the government infers, the fact that the property is stolen justifies its seizure by any means available, and its fruits of the seizure then constitute lawful evidence against the party from whom they were seized. The true meaning of the government's

assertions is that the issue of legality of seizure is immaterial in any larceny case. But the government is not concerned with the consequences of its "logic". Rather, it is content to argue that the seizure was legal because the property was stolen, and that the defendant is guilty because the property was seized from him, while seeing no relationship whatever between these two assertions.

The government further discusses *Rovario* v. *United States*, 353 U.S. 53, and purports to find therein an inference that disclosure of the identity of an informer cannot be compelled when a warrant has issued (Gov't. Br., p. 10 footnote). Such an inference is thoroughly preposterous. *Rovario* makes no such distinction.

The government proceeds from the premise that *Rovario* applies only (respondent's language), "in the exceptional case where disclosure of an informant's identity is essential to the defense of the accused." (Gov't. Br. p. 8). The government extrapolates this wishful premise from Your Honors' statement that the privilege must give way if the information is *relevant* and *helpful* to the defense of the accused. Your Honors used the word "essential" in a wholly different context in describing an alternative situation. The government apparently feels free to indulge such misquotation on the premise that it could have no more reliable "informant" than this court. So long as one has a reliable informant, it is unnecessary to quote him accurately. (Gov't. Br. p. 11).

But the treatment of *Roviaro* is mild compared to the manner in which the respondent distinguishes *United States* v. *Pearce*, 7 Cir., 1960, 275 F. 2d 318. In *Pearce*, the agent solemnly swore, in his affidavit for a search warrant, that he was proceeding, "on the basis of confidential information, from a source which in the past has proved reliable. . ." 275 F.2d 321. In fact, this assertion was proven to be totally false. 275 F.2d 322. Therefore, the

government now argues *Pearce* is totally unlike the case at bar, because petitioner did not prove that the affidavit was a lie in that single particular.

It is quite fantastic that the government should feel at liberty thus to argue, after having successfully blocked the defendant's inquiries on this very issue. Apparently, the experience in *Pearce* has impressed upon the prosecutors in this district that the best way to support an agent's affidavit is to foreclose all inquiries as to its truthfulness. Had the trial court's rulings in *Pearce* been identical to its rulings in this case, the government would undoubtedly have assured Your Honors on certiorari that there was no evidence that the informant in *Pearce* was not, "a source which in the past has proved reliable", and that the affidavit must thus be presumed true.

It is just such cogent prosecutor's logic as this which has placed the petitioner where he now stands.

The government goes so very far as flatly to inform Your Honors that the informant did not play a part in the offense (Gov't. Br. p. 12). This piece of advice could only have come to Your Honors from government counsel; it is most assuredly not to be found in the record. In fact, the fair inferences from the circumstances of this case are most directly to the contrary. It is somewhat surprising that the government would have the temerity to make such a statement in this court in any case. But it is particularly noxious in this case. In the court below, the government successfully blocked every inquiry relating to the informant, including the place where he held his conversation with the F.B.I. agent.[1]

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[1] In its brief, the government apologizes for this ruling by stating that "the trial court may have been overly cautious" (Gov't. Br. 11). The motive for the prosecutor's objection, which the trial court thus sustained, is left to conjecture.

In this court, it now argues that the informant was an innocent party unrelated to the crime, presumably because the defendant was unable to prove the informant's guilt. If the denial to the petitioner of all information relating to informant's activities or identity contributed in any degree to this lack of evidence, that fact is not deemed impressive by the writer of the government's brief. The reasoning process thus evolved is more distinguished by its novelty than its basic logic. As applied to criminal prosecutions, *omnia pro spoliatoreum priesumuntur.*

In summation of the government's position: Disclosure of the informant's identity would not have helped the defendant because, "There is nothing to indicate that the informant participated in or had any relationship to the crime of which petitioner stands convicted." (Gov't. Br. p. 12). Therefore, the defendant was properly denied any opportunity to show that the informant participated in or had any relationship to the crime of which petitioner stands convicted. Moreover, the government had "the right to seize property reasonably believed to be stolen [independent of] the guilt or innocence of [the petitioner]" (Gov't. Br. p. 9), and therefore, since it did not matter whether petitioner was innocent or guilty, "it would be particularly inappropriate to disclose the name of the informant in this case." At any event, the informer's identity was immaterial because the government had a warrant; and it is none of the petitioner's business how the government obtained its warrant, because the warrant was unnecessary (Gov't. Br., p. 10, footnote). It would be a different thing if the defendant had proven that the "reliable informant" did not exist; (Gov't. Br. p. 10, footnote), but the petitioner did not prove this, and, therefore, was properly denied the right to find out whether the informant existed.

We doubt that such a presentation effectively answers the points made to Your Honors in this Petition.

II.

THE SUFFICIENCY OF THE EVIDENCE.

It is impossible to divorce the issue of evidentiary sufficiency, from that of the informant's identity. It is very patent that an examination of the informer would probably resolve all doubts that exist in this case.

We think that the government has unconsciously demonstrated to Your Honors the glaring weakness of the case in disclosing, as it did at p. 13 of its brief, the totality of the evidence on which it relies. We hope that Your Honors will consider each of the items thus placed in issue by the government. They are as follows: 1. "A personal fur piece was, at the time of the seizure, in the very same closet." It is uncontradicted evidence that this "personal fur piece" had not been seen by petitioner, or used by his wife, at any relevant time. 2. "Clothing used on the vacation had been taken from this closet." There is no evidence that the furs were there at that time, nor that petitioner took the clothes from the closet. The argument is almost absurd. But, if, as the government infers, the furs were in the closet before the defendant went on vacation, we would then have the ridiculous situation of a receiver of stolen goods placing the goods in his home, going on a vacation a thousand miles away, leaving keys to the home with a number of other persons, including disinterested neighbors. Such a contention is so utterly contrary to human experience as to require that the mere statement of the proposition suffices to condemn it. 3. "The furnished basement area adjacent to the closet was in general use by the occupants." This proposition stretches the

evidence beyond the permissive bounds of elasticity. The "occupants" referred to by the government, do not include the petitioner. But in any event, it is hard to see how one can be charged with notice of what is on the other side of a door.

The government also makes reference to "testimonial conflicts", the relevance of which is conjectural at best. As we observe in our original brief, the day when Leo returned the key has little materiality in view of the ease with which such a key can be copied. And the location of the bags in which the agents placed the furs has not the slightest claim to relevance, so far as we can see.

What the government has really done is to point up the ultimate absurdity of the case: that the evidence tends much more strongly to incriminate petitioner's wife, than petitioner, without incriminating petitioner's wife in the slightest degree is obvious.

CONCLUSION.

So utterly outlandish is the failure of justice in this case, and so thoroughly wanting in reason are the government's arguments, that it is hard to realize that we stand before the ultimate judicial authority of the United States pleading for the review of a conviction which has been affirmed.

We believe that the government's presentation to Your Honors suffices in itself to show not only the injustice of petitioner's conviction, but the very real threat posed by that conviction to the future administration of criminal law.

We pray that Your Honors will deem this case worthy of review, and will characterize the procedures followed below by appropriate comment.

Respectfully submitted,

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No. 223

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

SAMUEL JOSEPH RUGENDORF,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certriorari to the United States Court of Appeals for the Seventh Circuit

Brief for Petitioner

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Brief for Petitioner

A. REFERENCE TO REPORTS.

The opinion of the Court of Appeals is reported at 316 F. 2d 589. The trial court did not render a formal opinion, and its decision is unreported.

B. JURISDICTION.

The jurisdiction of this court is invoked under Title 28, U.S.C., Section 1254(1). The judgment of the Court of Appeals was entered on April 30, 1963. A petition for rehearing was timely filed and there denied on May 24, 1963. The petition for writ of certiorari was filed in this court on June 21, 1963 and certiorari was granted on October 24, 1963.

C. STATUTES INVOLVED.

Title 18, U.S. Code, Section 2315 provides in relevant part:

> "Whoever receives, conceals, stores, barters, sells or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more * * * moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken * * *
>
> "Shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

D. QUESTIONS PRESENTED FOR REVIEW.

1.

In a criminal prosecution, where the sole evidence tending to connect a defendant with the unlawful concealment of stolen merchandise consists in the finding of that merchandise on premises partially occupied by him, but to which a number of others also had access; and where the merchandise is seized pursuant to a search warrant issued on information provided by an unnamed confidential informant who told a federal officer that he saw said merchandise on said premises; and where defendant denies all knowledge of the presence of the merchandise on those premises; then,

May disclosure of the identity of the informer, or other facts concerning his activities, be compelled only if the informer is first proven to have been a moving party in the commission of the crime?

2.

Does the so-called "informer's privilege" against disclosure, extend to any matter not related to the identity of the informer?

If so, what is the limit of the reach of the privilege? And does the privilege ever authorize the withholding from the defense of facts which might tend to establish innocence?

3.

May disclosure of facts relating to an informant be withheld in all proceedings wherein a defendant seeks to invalidate a search warrant obtained on information supplied by that informant, simply by reason of the nature of the proceedings and without regard to any other consideration?

4.

Where a defendant has never before been arrested or charged with a crime; and where the defendant makes a strong and uncontested showing of previous good character and reputation; and where police testimony establishes without contradiction that the defendant is not known to be engaged in any form of criminal activity; then,

May disclosure of the identity of an informant be withheld because of the prosecutor's unexplained and unsupported assertion that such disclosure "might and probably would" result in the informant's death?

5.

May a conviction on a charge of receiving stolen property in violation of Title 28 U.S.C. Section 2315, be predicated entirely upon proof that stolen property was found on premises partially occupied and partially owned by defendant, but to which a number of others also had access?

E. STATEMENT OF THE CASE.

Following a jury trial held in the District Court for the Northern District of Illinois, petitioner was convicted on an indictment charging the unlawful receipt and concealment of 81 stolen furs of a value exceeding $5,000 which had been transported in interstate commerce, in violation of 18 U.S.C. 2315 (R. 1). He was sentenced to the statutory maximum of ten years with a recommendation that he become eligible for parole after serving two years (R. 12). The conviction was affirmed by the Court of Appeals for the Seventh Circuit, 316 F. 2d 589. This court granted a petition for certiorari, which petition questioned the sufficiency of the evidence and the propriety of the denial to petitioner of information relating to the confidential informant upon whose revelations the prosecution was based.

Petitioner and his wife own and occupy a single family dwelling in Chicago, Illinois. In the basement of the residence was a recreation room, one wall of which contained three doors leading to separate closets (R. 20-31).

On February 17, 1962, petitioner and his wife left Chicago for a vacation. They returned on March 4, 1962. During their absence, petitioner's brother Leo Rugendorf, his sister, his son, and one Roskin, a neighbor, all had keys to petitioner's home for any necessary emergency entrance, service, mail removal or similar purpose. (R. 30, 39.)

On his return from his vacation, petitioner resumed his business activity. He operated a grocery 19 miles from his residence. It was his practice to arise about 5:30 in the morning, spend the entire day in his store, and return to his home about 8:30 P.M (R. 32, 39-40).

Both petitioner and his wife later testified that at no time between their return from their vacation on March 4 and the petitioner's arrest on March 22, did petitioner have occasion to enter the closets in the basement. Petitioner's wife, during that period, entered one of the closets in which certain foodstuffs were stored, but did not enter the closet in which were found the furs here in question (R. 31, 32, 40).

On March 22, 1962, an affidavit was filed by an F.B.I. agent before the United States Commissioner in support of an application for a warrant authorizing the search of the basement of petitioner's residence (R. 6-8). This affidavit recited:

(1) That an FBI agent in Alabama told affiant of an Alabama burglary on February 10, 1962, involving fur capes and stoles (R. 6-7).

(2) That an unnamed previously reliable informant relayed information to affiant, through another agent, that one Schweihs committed the Alabama burglary (R. 7).

(3) That police officer Kelleher told another agent, McCormick, that on March 1, 1962, he saw Schweihs at Rugendorf Bros. Meat Market, managed by petitioner (R. 7).

(4) That another unnamed previously reliable informant told another agent that petitioner's brother, Leo Rugendorf, was a fence, and that Leo and defendant Sam were associated in the meat business (R. 7).

(5) That, yet another previously reliable informant told another agent who told affiant that Schweihs and others were burglars who disposed of stolen goods through Leo Rugendorf (R. 8).

(6) That on March 16, 1962, a fourth unnamed but reliable informer told affiant that he had seen 80 fur garments in petitioner's basement "within the past week," describing them as mink, otter and beaver jackets, with labels removed (R. 8).

(7) That the same informant told affiant that he, the informant, "had been told" the furs were stolen (R. 8).

(8) That descriptions of all furs stolen in the United States valued in excess of $5,000.00 are reported to the FBI (R. 8).

(9) The affiant reviewed FBI files and the only burglary in the preceding six months involving furs similar to those described by the confidential informant, had occurred on February 10 in Alabama (R. 8).

Based upon this affidavit, a search warrant was issued (R. 4-5) and served on petitioner's wife at the residence (R. 5). (Petitioner, at the time, was at his place of business, R. 29.) 82 furs were found in the basement closet. Petitioner's wife expressed surprise, identified one of the furs as her own, and surrendered the remainder to the officers (R. 16).[1]

The agents carried away the furs in three white bags which they found in the basement, one of which was a laundry bag in active use and bearing petitioner's name (R. 42). Mrs. Rugendorf emptied the laundry from the

[1] At the trial, Mrs. Rugendorf testified that she had told the agent that this fur was hers "automatically" because it had been in her house for a couple of years, but that it really belonged to her sister-in-law (R. 36).

bag in order that the agents might use it to carry away the furs (R. 16).[2]

Petitioner was thereupon arrested. He denied all knowledge and complicity, but suggested to the arresting agents that it was possible that his brother Leo might be responsible for the presence of the stolen furs in petitioner's basement without his knowledge (R. 40-45, 64).

Shortly thereafter, petitioner was indicted (R. 1). In advance of trial, the petitioner moved to suppress the furs seized in his basement, alleging as grounds that the allegations of the application for search warrant were untrue, and that the affidavit was legally insufficient to support the issuance of a search warrant (R. 2). The trial judge ruled that the affidavit was legally sufficient (R. 15). The evidentiary hearing of the motion to suppress was held during the course of the subsequent trial (R. 17).

At the commencement of the trial, the defense requested the names of the confidential informants described in the application for the search warrant. In support of this request, defense counsel stated that the identity was necessary to the defense because the informant, as a witness, would necessarily demonstrate that the defendant had nothing to do with the crime. He further suggested that even the government should be interested in calling the informant as a witness since the informant obviously would have some knowledge as to whether the defendant was guilty (R. 14). The government objected to this request, stating, "... that if the government is to reveal the name

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[2] Mrs. Rugendorf testified that the other bags were found in the closet with the furs (R. 36). The agent testified that they had been found in a corner of the basement recreation room (R. 62).

of any informants they might and probably would be killed." (R. 15). The trial court denied the defense request (R. 15).

The case for the prosecution consisted, in its entirety, of: (1) the testimony of an FBI Agent that he executed the contested search warrant at petitioner's home and there seized 81 furs (R. 15-16); and

(2) a stipulation that the furs thus seized had been stolen in two separate thefts in Louisiana and Alabama and were valued in excess of $5,000 (R. 15).

The government thereupon offered the furs into evidence, and a hearing was held outside the presence of the jury on the evidentiary aspects of petitioner's motion to suppress. The motion had alleged, and defense counsel verbally reiterated that the search warrant application was untrue. (R. 2, 13, 14).

The hearing commenced with the testimony of police officer Kelleher that he had not told the agent that the Rugendorf Meat Market was managed by Sam Rugendorf (R. 17), contrary to the allegations of the affidavit (R. 7). Petitioner testified that he was engaged in the grocery and meat business several miles from the Rugendorf Bros. Meat Market, with which he had no connection whatever since 1952. He had not been at the Rugendorf Bros. Meat Market for the past eight years (R. 19).

An employee of Rugendorf Bros. Meat Market who had worked there for four years stated that he had never seen defendant at that place of business (R. 21). Another witness, the manager of Rugendorf Bros. Meat Market since 1948, also testified that the defendant had no connection with that business (R. 21).

All of the foregoing defense evidence was uncontradicted.[3]

As his next witness on the hearing of the motion, petitioner called FBI Agent Moore, who testified that he was the agent in charge of the case and that he had had a conversation with the confidential informant. He was then asked: "Where did you have this conversation with this confidential informant?" The prosecution objected, stating that the government could not reveal the name of the informant "because it would cause a possible murder." The objection was sustained (R. 22).

Successive objections, assigning the same reason, were sustained to each of the following questions:

"What is the name of this man?"

"Where is he now?"

"On what day did he say he saw the furs in the basement of the home of Sam Rugendorf?" (R. 22).

The defense argued that the affidavit's recital that on March 16, the informant said that he had seen the furs "within the past week," left a substantial period of time during which the defendant's whereabouts would have to be accounted for. The defense sought to narrow that area of proof, and contended that the information was necessary to petitioner's defense (R. 23).

The defense further argued that the search warrant affidavit had been proved to be false in two particulars, and that it was proposed to demonstrate, by the questions ob-

[3] The agent who first arrested petitioner testified that he was unable to find him at the Rugendorf Meat Market. Instead, petitioner was apprehended at his grocery store, several miles away. (R. 29, 65-66).

jected to, still further falsity. The court, however, expressly foreclosed any further questioning of the witness Moore (R. 24), denied the motion to quash the warrant and suppress the evidence, and admitted the furs into evidence, ruling:

> "Even if part of the affidavit should be false, the main part of it, the material part, is true, because they actually found the garments there. Bring the jury." (R. 25).

The exhibits were received into evidence, and the government rested. A defense motion for acquittal was denied.

The defense introduced evidence, not contested or rebutted, showing petitioner's good reputation (R. 26-30), his absence from Chicago in February and March of 1962, and the holding during that period of keys to his residence by his brother Leo and others.[4] (R. 30, 37).

Defendant and his wife both testified, denying any knowledge of the presence of the furs in their home and of any transaction relating thereto (R. 30-34 and 37-45). They both testified that the raiding (R. 33) and arresting (R. 42-44) agents had suggested that Leo was responsible for the presence of the furs in their home. On rebuttal, the principal agents admitted that there had been a discussion concerning Leo with Mrs. Rugendorf at the time of the raid (R. 62) and with petitioner at his arrest (R. 64), but stated, that petitioner and his wife had made the suggestions con-

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[4] Petitioner testified that Leo had never returned the residence key which had been given him when petitioner left on vacation (R. 39). One of the arresting agents testified on rebuttal that petitioner told him that Leo had returned the residence key (R. 64).

cerning Leo. One agent further corroborated petitioner's testimony that while under arrest, and in the presence of the agents, he had telephoned Leo's home. The petitioner testified that he had done this at the direction of the arresting officers (R. 42-44); but the agent testified that the call had been made at petitioner's request (R. 64).[5]

Motions for directed verdict of acquittal made at the close of the prosecution case (R. 25) and at the close of all of the evidence (R. 66) were denied. The jury found the defendant guilty as charged in the indictment.

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[5] Petitioner also testified that while under interrogation, he had offered "to take a lie detector test and I'll pay for it myself." On cross-examination, he repeated the offer. (R. 47) The prosecutor asked if he were willing to take such a test "right now", (R. 49) and petitioner and his attorney agreed. It was stipulated that the results be submitted to the jury. (R. 50) With the approval of the court, an examiner was agreed upon. (R. 56) Subsequently, however, the trial judge changed his mind. He stated that a highly emotional person might show false indicia of guilt, and that a "very cool and collected" person might conceal reactions indicating guilt, and refused to permit the test to proceed. (R. 58) All these events occurred in the presence of the jury. Subsequently, a government agent denied that Petitioner had offered to take such a test while under interrogation. (R. 65)

SUMMARY OF ARGUMENT.

1. The "informer's privilege" is susceptible of grave abuse. A refusal to require reasonable disclosure, imperils freedom of speech and press, security from unreasonable search and seizure, freedom of association, the right to counsel, and other fundamental elements of liberty.

2. In view of its materiality to his defense, the petitioner was wrongly denied information concerning the informant whose disclosures generated the search of his home. Because he was denied all information concerning the informants, he was necessarily unable to prove that they were moving parties in the crime; but this last is completely irrelevant to his legal entitlement to the disclosures he sought. It is also quite immaterial that a search warrant is involved in this case, for a defendant has as much right to such information in support of an effort to suppress evidence as he has in any other type of proceeding. Any other rule will make the policeman the sole effective judge of the existence of probable cause. The contention that the requested disclosures might result in a murder was not a proper ground for invoking the privilege, because the information sought was highly relevant to the defense and because there is no apparent basis for the apprehension thus expressed.

3. The evidence seized under the authority of the contested search warrant, should properly have been suppressed. The affidavit supporting the application for the search warrant was legally insufficient, because not one fact therein recited was known to the affiant, and there was no apparent basis for believing the information received

from the informant. The petitioner proved beyond question that the affidavit was false in relevant part, and was therefore entitled to suppression of the evidence resulting from that affidavit. At the very least, he was entitled to a full hearing on the issue of probable cause, with all necessary disclosures concerning the informant. It is completely immaterial that incriminating evidence was in fact found at his home; a search cannot be justified by its results. Disclosures were unreasonably withheld from petitioner, even when there was no possible danger of compromise of the identity of the informant. The government's refusal to permit defense inquiries on the issue of probable cause, is itself sufficient to require suppression of the evidence whose seizure is thus questioned.

4. Even with the questioned evidence considered, there was insufficient proof of guilt. The most that can be said to have been proved against Petitioner, is his constructive possession of stolen property. But there is no evidence that he knowingly possessed the stolen goods, and knowledge of their stolen character may not properly be inferred from constructive possession alone.

ARGUMENT.

I.

TO PERMIT THE PROSECUTION TO TAKE REFUGE BEHIND AN INFORMER OF UNDISCLOSED IDENTITY IMPERILS ALL THE BASIC CIVIL LIBERTIES.

The unnamed confidential informant presents to society, problems potentially of much greater seriousness than those confronting the individual defendants who stand accused by him.

No concern which this court may express for the preservation of basic civil liberties, can viably survive the protection which is given to the confidential informant. The case at bar, aggravated as it is, is not atypical of the operation of the "informer privilege" in federal criminal jurisprudence. It may readily be demonstrated that there are few basic rights which will endure the acceptance of practices of this nature.

For example, this court has recognized the vulnerability of the freedoms of speech and press to abuse of the power of search and seizure. The historic struggle between the power of search and the quest for freedom of expression was discussed in *Marcus* v. *Property Search Warrant*, 367 U.S. 717, 724-729, 6 L.Ed. 2d 1127, 1132-1135. The statute there considered was found to vest in police officers an improper discretion as to what might be seized. But can it be doubted that the same police end may readily be served through the device of the confidential informant, of whose reliability the policeman is the sole and absolute judge?

This court has likewise uniformly granted protection against the introduction of wiretap evidence, where that issue was presented squarely. Yet, it has been judicially recognized that the term "confidential informant" is "a frequent euphemism for a 'wire tapper' ". *United States* v. *Coplon*, 185 F. 2d 629, 639, 2 Cir., 1950. If the policeman frankly states that his information was obtained through wire tap, the resultant evidence is excluded. But information received through a "confidential informant" is considered a proper basis for a search, although the court may not know whether the "confidential informant" may be the policeman at the next desk with whom wire tap confidences are interchanged with the policeman present in court. For what, in the mind of a policeman, could be an informant of greater past proven reliability, than a fellow officer whose evidence stems from the defendant himself in a telephone conversation with his attorney?

This court has treated the surreptitiously installed and intruding microphone as a violation of rights granted by the Fourth Amendment. *Silverman* v. *United States*, 365 U.S. 505, 5 L.Ed. 2d 2734. Can it be doubted that the procedures there described are equally noxious if the microphone is installed and used by a "confidential informant of past proven reliability" on the basis of whose disclosures a policeman obtains a search warrant?

This court has been steadfast in enforcing the protection against unlawful search and seizure granted by the Fourth Amendment. *Wong Sun* v. *United States*, 371 U.S. 471, 9 L.Ed. 2d 44. It has also protected the citizens against comparable constitutional deprivations by state officials, taking an extremely realistic view of the temptations presented to "federal officers being human." *Mapp* v. *Ohio*, 367 U.S. 643, 657-660; 6 L.Ed. 2d 1081, 1091-1093. Yet, it is clear that had the agents in *Wong Sun* chosen to

treat the confessing accomplice as a "confidential informant of past proven reliability", by regarding his confession of his own guilt as reliable and as "past" by ninety seconds at the time of the succeeding expression inculpating Wong Sun, the conviction may well have been sustained. A similar procedure could obviously have been followed in the *Mapp* case. In its fundamentals, "the ignoble shortcut to conviction" (*Mapp*, 367 U.S. 660, 6 L.ed. 2d 1093) is still "left open", and strongly "tends to destroy the entire system of constitutional restraints on which the liberties of the people rest."

In the realm of liberties more prosaically accepted, but no less zealously guarded, the confidential informant is free to stride forth as a destructive colossus. This court has protected the freedom of association from unwarranted incursion through the seizure of membership lists (*Bates* v. *City of Little Rock*, 361 U.S. 516, 4 L.Ed. 2d 480; *Louisiana, ex rel. Gremillion* v. *NAACP*, 366 U.S. 293, 6 L.Ed. 2d 301) and has taken a highly practical view of the deterent to free association implicit in compulsory disclosure and its direct relationship to freedom of speech. (*Shelton* v. *Tucker*, 364 U.S. 479, 486, 5 L.Ed. 2d 231, 236). Yet, a police officer would have to be more than human to treat as suspect information from whatever source, that a crime is being committed on the premises of an organization whose aims and purposes, while constitutionally legitimate, are anathema to him. The temptation to inspect membership lists in the course of his search, would probably be irresistible.

Similarly, the anonymous pamphleteer whose historic contribution was recognized in *Talley* v. *California*, 362 U.S. 60, 64-65, 4 L.Ed. 2d 559, 563, is at the mercy of the confidential informant who has, or claims to have information which would justify a search of his press facilities.

The right to counsel, protected by this court from all encroachment (*Gideon* v. *Wainright*, 372 U.S. 335, 9 L.Ed. 2d 799; *Ferguson* v. *Georgia*, 365 U.S. 570, 5 L.Ed. 2d 783; *Hamilton* v. *Alabama*, 368 U.S. 52, 7 L.Ed. 2d 114) is ephemeral indeed if confidential communications with that counsel eventuate in information, however acquired, in the hands of a "confidential informant", whose identity is protected even while he generates search and arrest warrants. Yet, the telephone of an attorney is no more immune than any other to the art of the wire tapper, who may thereby advance his status as a confidential informant on a wholesale basis.

The inherent vice in the concealment of the identity of the confidential informant, is that it enables the police officer to serve as the sole judge of the propriety of his own activities, of the "reliability" of his confidential informant, and of the necessity of protecting that identity against meaningful judicial scrutiny.

The compelling necessity for such scrutiny is shown by the facts disclosed in *United States* v. *Pearce*, 275 F. 2d 318, 7 Cir., 1961. There, the agent slavishly followed the established routine description of the informant as one of established reliability, although the informant had never made a previous disclosure. The facts strongly suggest that the agent there withheld the informant's identity in order to conceal a lack of probable cause, and not in furtherance of any legitimate investigative objective.

We urge to your Honors that no more appropriate area could be found for the exercise of this court's power " . . . to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins* v. *United States*, 364 U.S. 206, 217, 4 L.Ed. 2d 1669, 1677.

If petitioner was properly denied information concerning the informant who accused him, it is hard to imagine any circumstance under which any future defendant may be deemed entitled to such disclosure. We believe the case at bar presents squarely to your Honors, the determination of the minimum standards for a defendant's entitlement to such information.

II.

THE PETITIONER WAS WRONGLY DENIED INFORMATION CONCERNING THE CONFIDENTIAL INFORMANTS.

According to the government's affidavit, this prosecution ensued consequent upon information received from certain confidential informants.

The jury's verdict is necessarily the product of speculation as to what those informants might have said, if called as witnesses.

The informants certainly possessed information highly relevant to the case. Very probably, they knew all its ultimate facts. But they were not called as witnesses, because the government refused to say who they were. It refused even to say when they gave their information.

And so we will never really know, with certainty, whether the defendant is in fact guilty, or completely innocent. We will never even know whether the evidence against him was lawfully obtained.

Only the informants know these things. And they were not permitted to speak.

Against this somber background, we approach the legal issues presented by the case.

A. IMPROPER LIMITATIONS HAVE BEEN IMPOSED ON THE RIGHT OF THE PETITIONER TO OBTAIN INFORMATION CONCERNING THE INFORMANT.

The most recent definitive expression by your Honors on the issue of the right of a criminal defendant to learn the identity of an informant, was made in *Roviaro* v. *United States*, 363 U.S. 53, 1 L.ed. 2d 639. In *Roviaro*, it was made clear that the so-called informer's privilege must give way "where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause . . . " 353 U.S. 60-61, 1 L.ed. 2d 645.

This holding has generated a flurry of inventive activity in a search for mechanistic slogans designed to circumvent the effect of that decision.

In *Roviaro*, the informant helped to set up the commission of the crime and was present at its occurrence. Because of this, it has frequently been asserted that a defendant cannot obtain information relating to an informant unless the informant is first shown to have planned and participated in the crime.

Likewise, in *Roviaro*, no search warrant was involved. Because of this fact, it has also been held that the informant privilege is unassailable where the information is sought by a defendant in aid of his attempt to suppress evidence or to quash a search warrant.

Concededly, those were the facts in *Roviaro*. But we hope that your Honors will agree that those facts do not delimit the principles of *Roviaro*. Both of those arguments—the supposed non-participation by the informant,

and the fact that a search warrant was issued—have been used by the Court of Appeals below as grounds for the denial of the defendant's request (R. 73). We submit neither reason is valid.

1. The test of informant's participation in the offense is improperly applied.

It is obvious that the extent of a defendant's knowledge of the facts of a criminal case, will generally be proportionate to the degree of his personal involvement.

Accordingly, if it be a condition of a defendant's right to information concerning an informant, that he first show the informant was a participant in the crime, it seems clear that the greater a defendant's entanglement in the crime, the more successful he will be in making such proof.

And where, as here, a defendant denies all knowledge of the crime, he is faced with a literally impossible task in attempting to show that the informant was a party to the offense.

Quite obviously, a defendant who is truly innocent and who is denied all knowledge concerning an informant, could not possibly show that the informant was a party to the crime.

But that is certainly no basis for a finding, such as that implicit in the Court of Appeals' opinion here reviewed, that the informant in fact did not participate in the crime.

The government affidavit states that the informant saw the furs in the basement of petitioner's home and was told that they were stolen. Certainly, he was not a mere passer-by. Assuming that he was not a trespasser, he must necessarily have obtained his information with the acquiescence of the guilty parties. The attitude of those parties toward

the petitioner and his residence would in itself have resolved all the issues of this case. Did the petitioner admit him and show him the furs? If so, the petitioner is almost certainly guilty. Was the informant admitted by an unauthorized key during the temporary absence of petitioner and his wife, and warned to leave not even a cigarette as a trace of his presence. If so, the petitioner is almost certainly innocent.

But even aside from this, the government affidavit fairly shouts the intelligence that the informer knows not only who stole the furs, but who put them in petitioner's basement. He knows beyond question whether petitioner is innocent or guilty. And for that reason, petitioner desparately sought to examine the informant.

The Petitioner was denied that right because, lacking the information he sought, he was necessarily unable to prove that the informant was a guilty party who "*helped set up the commission of the crime and . . . was present at its occurrence*" (emphasis copied, R. 73). This is not only illogical, but supremely unjust.

On that premise, a defendant may be denied the right to examine an informant, even though that informant was an eye witness to the crime and knows the defendant to be innocent, if the informant came by his knowledge innocently. The very statement of the proposition is shocking.

Even if the informant's participation was in fact criminal, he must *both* help set up the crime and be present at its occurrence. Direct participation in the crime itself, with the resulting certain knowledge whether defendant is innocent, would not expose an informer to the defendant unless the informer also helped to set up the crime. There is simply no reasonable basis for such a rule, and certainly this Court has never even by intimation rendered any such holding.

Yet, this misconception of the reach of *Roviaro* has gained wide currency. The test has been applied (albeit on different facts) in *Jones* v. *United States*, 271 F. 2d 494, 496, C.A.D.C., 1959; in *Miller* v. *United States*, 273 F. 2d 279, 281, C.A. 5, 1960; in *Pegram* v. *United States*, 267 F. 2d 781, 782, 6 Cir., 1959; in *United States* v. *Whiting*, 311 F. 2d 191, 196, 4 Cir., 1962; as well as in the case at bar.

This "rule", if such it be (and certainly the petitioner has heretofore felt its full impact) has no possible basis in law or in logic. The question before a trial court relates to the guilt or innocence of the defendant, and not that of the informer. The right to compel the testimony of a witness is not affected by complicity, or lack thereof, on the part of that witness. *Piemonte* v. *United States*, 367 U.S. 556, 559, 6 L.Ed. 2d 1028, 1031, footnote 2.

The only possible relevant inquiry is whether there is reasonable ground to believe that the identity of the informant might be helpful to a legitimate defense effort. Where information concerning an informant "is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." *Roviaro*, 353 U.S. 61, 1 L.Ed. 2d 645. This is no more and no less true, whether or not the informer be himself a criminal.

2. The fact that the proceeding involved a search warrant is immaterial.

In the case before your Honors, defense counsel told the trial court that if the informant "takes the stand it will demonstrate that Sam Rugendorf had nothing to do with it . . ." (R. 14). He further stated that in view of the scope of the informer's knowledge, the government should be interested in calling him to the stand if the petitioner were truly guilty (R. 14).

Defense trial counsel contended that he was entitled to learn the identity of the informants "if the names of the informants are necessary to a proper defense or a proper presentation of the defendant's case in attacking the search warrant." (R. 75).

The trial court denied the request (R. 15).

The Court of Appeals upheld this refusal, in part on the authority of *United States* v. *Whiting*, 311 F. 2d 191, 196, 4 Cir. 1962, wherein it was held that the names of the informers need not be divulged where the information is "wanted in support of the effort to invalidate the search warrant and not to help the defendants in the presentation of their case." (R. 74).

If this were in fact the law, it would have no application in the case at bar. The petitioner demonstrated on a number of occasions that the name of the informer was needed in furtherance of his substantive defense (R. 13, 14, 23, 24, 75).

But this "rule" (presently applied, so far as we know, only in the Fourth and Seventh Circuits) has no apparent basis. Simply stated, it would mean that a defendant is entitled to know the identity of an informant only where, in addition to other qualifications, he can show that such information would help him to prove the substantive fact of his innocence. He cannot, however, obtain this information where its only effect would be to enable him to assert a fundamental constitutional right.

This is fearful doctrine indeed. Basic liberties are preserved only by a concern for procedural safeguards. Approval of the *Whiting* doctrine would badly downgrade a procedural safeguard of explicit constitutional dimensions.

If information derived from an informant is to be probable cause for a search warrant, and if the identity of the informant is to be privileged in all proceedings attacking a search warrant, then there can never be any true determination of probable cause save in the mind of the policeman. As was held in *Costello* v. *United States*, 298 F. 2d 99, 102, 9 Cir., 1962,

> "A reasonable opportunity for the appellant to challenge the reliability of the informant must be permitted on the motion to suppress, *or no real judicial check would ever take place.* The refusal of the trial court, upon appellant's request, to require disclosures of the name of the informant under these circumstances was error." (Emphasis added.)

The *Whiting* rule, as adopted by the Seventh Circuit in the case at bar, draws a completely artificial distinction between the fact of substantive innocence, and the procedural safeguards provided by the Constitution. The case at bar would make the police officer the sole and final arbiter of the issue of probable cause in all search warrant cases based on the supposed tip of an informer. The rule would somehow grant to him who would assert in the courts a basic constitutional right, a lesser status before the law than is given to him who would show the fact of his nonparticipation. The rule is mischievous, dangerous, and irrational. Your Honors have recognized that protection against unlawful search and seizure is inextricably interwoven with other constitutional freedoms. *Marcus* v. *Property Search Warrants*, 367 U.S. 717, 724, 6 L. Ed. 2d 1127, 1132. The *Whiting* rule would not only impair those freedoms, but would cast opprobrium upon him who would assert them.

B. NO VALID GROUNDS WERE ASSERTED FOR DENIAL TO THE DEFENSE OF INFORMATION CONCERNING THE INFORMANT.

The prosecutor at the trial, to his credit, did not contend that the identity of the informant was immaterial to the issue of the case. While this argument was made and apparently accepted on appeal, it is beyond legitimate argument that the informant must necessarily have possessed knowledge which would be highly relevant to the determination of petitioner's innocence or guilt.

Further to his credit, the prosecution did not contend at the trial that the attack upon the search warrant was itself sufficient to deprive the petitioner of entitlement to this information. And certainly, he did not even intimate that the informer had no connection with the crime. While these propositions form the basis of the Court of Appeals' opinion, they were not urged in the trial court.

The sole basis urged at the trial for the denial of this information to the defense was "that if the government is to reveal the name of any informants they might and probably would be killed." (R. 22).

In suggesting that such disclosure "would cause a possible murder" (R. 22), the prosecutor was saying nothing more than might be said in any informant case. The theoretical possibility of murder as retribution for unfavorable testimony probably exists in any case, civil or criminal, regardless who the parties may be.

Yet, we question whether criminal jurisprudence may, with constitutional propriety, be geared to such possibilities. Must not some deference be shown to the forces mobilized by organized society to prevent violence? If criminal defendants are to be denied fundamental rights on the theory that innocent people might otherwise suffer,

has not violence been done to the presumption of innocence which attaches to the defendant himself? If the government is to be permitted to withhold a relevant witness on the ground that he might be murdered, may not any private citizen, with even greater propriety, properly refuse to participate in any judicial proceeding on exactly the same grounds?

The government's expressed concern for the safety of persons exposed as witnesses would be more tenable if it were less selective. In fact, the government very probably extends no special deference to any person whose testimony it seeks to compel, and who expresses unwillingness to testify because of possible retribution. In *Piemonte* v. *United States*, 367 U.S. 556, 559, 6 L. Ed. 2d 1028, 1031-1032, your Honors considered the contempt conviction of an individual who refused to testify on precisely the grounds relied upon by the prosecutor in the trial court here. Observing that fear of underworld retaliation did not mitigate the refusal to testify, your Honors held,

> "Nor would this be a legal excuse. Every citizen of course owes to his society the duty of giving testimony to aid in the enforcement of the law . . . The government of course has an obligation to protect its citizens from harm. But fear of reprisal offers an immunized prisoner no more dispensation from testifying than it does any innocent bystander without a record."

We are confident your Honors did not mean, by the quoted language, to say that fear of underworld retaliation confers no dispensation, only in the case of prosecution witnesses. The law, whose enforcement is the overriding consideration in such matters, presumes a defendant's innocence and grants him the right to compel exculpatory testimony, fully as forcefully as it provides for the in-

carceration of offenders. "Law enforcement" is a burden only partly shouldered by the policeman and the prosecutor; defense counsel play an equally significant role, concerned as they are with the enforcement of laws no less important to society than those "enforced" by the police.

A fear of underworld retribution either justifies the withholding of evidence, or it does not. In *Piemonte*, your Honors held that it did not. Any contrary presumption strikes at the whole warp and texture of our society. But if such a presumption is to be indulged, there would seem no more reason to apply it to witnesses sought by the prosecution, than to those sought by the defense.

The petitioner has never in his 55 years been suspected of any form of illegal activity (R. 30), much less of murder. His conduct had been exemplary, and his reputation excellent (R. 26-28). Those facts in no way affect the principle involved. But they lend an especial poignancy to the prosecutor's failure to assert that the petitioner might cause the "possible murder" which the prosecution purported to fear. And they are highly relevant to any evaluation of the bona fides of the prosecutor's contention.

If a "possible murder" be a sufficient ground for the prosecution's withholding of evidence in the case at bar, it is hard to imagine any case in which the same assertion would not serve equally well. And the effectiveness of the assertion upon the outcome of the litigation may, we feel, be determined not only from the adjudication of guilt, but as well by the imposition of a maximum sentence upon a defendant in advanced middle age with a previously spotless reputation.

C. THE COLLATERAL INFORMATION SOUGHT BY THE DEFENDANT WAS WRONGLY DENIED TO HIM.

1. The place of the informer's conversation with the agent was improperly withheld from the defense.

In the case at bar, the prosecution went so very far as to claim that to disclose the site of the informant's conversation with the policeman "would cause a possible murder" (R. 22). If the law were to recognize a presumption of future homicide, it would seem that its application to that defense question would impose an unnecessary strain. It would also seem at least equally probable that the answer to the question might disclose a trespass into defendant's basement by federal agents or individuals working on behalf of the agents.

Obviously, if the conversation took place in the defendant's basement, or in the immediate vicinity of the defendant's home, a strong basis would be generated for the belief that the prosecution evidence was the product of an unlawful search.

If, on the other hand, the conversation took place at the informant's home, productive inquiries could have ensued which would not in any way have compromised the informant's address.

And if the place where the conversation took place was utterly irrelevant, the prosecutor's objection cannot have been made in good faith.

It is impossible to imagine how any answer to that question (short of the informant's address, which the agent certainly would not have volunteered) could "cause", or even remotely contribute to "a possible murder".

The voicing of the objection to that question suggests strongly that the thought of a "possible murder" may have been somewhat euphemistic in other applications as well.

2. Denial of information as to the date on which the informant saw the furs, was clearly improper.

In its affidavit, the government stated that on March 16, 1962, an informant told the agent that he had seen the furs in petitioner's basement "within the past week". In the trial court's view, this meant that the informant did not say on what day he saw the furs (R. 23). If this were true, the agent would simply not have had the information with which to answer the defense question, so that a "possible murder" could not possibly have ensued.

But the affidavit does not say that the informant did not give the exact date. In fact, the intendments are to the contrary. And the government disavows any averments which the affidavit "does not compel". (Brief in Opposition to Certiorari, p. 11). If, as seems much more probable, the informant told the agent the date on which he saw the furs, a highly relevant area of possible defense evidence is generated. A whole week is involved. If it could be shown that the informant saw the furs at a time when petitioner and his wife were somewhere else, that fact would serve to create the clear inference that an unauthorized copy of the petitioner's house key was in the hands of the guilty parties (as is quite probable considering the number of persons who held such keys during petitioner's vacation). The showing of such furs by the thieves during petitioner's absence, would have been highly persuasive evidence that the thieves were interested in keeping petitioner from learning of the presence of the furs.

But petitioner was obviously unable to make this showing if he were told only that the informant saw the furs some time within a given week.

It is, of course, conceivable that the petitioner himself showed the furs to many possible informants, and that to learn the date would identify the informant. But certainly, the prosecution did not suggest any such possibility even in its affidavit, and this thought hardly rises to the dignity of a guess.

And in this connection, there must be borne in mind the strong possibility that *nobody* showed the furs to the informant. Instead, the informant may well have gained his access, and his inspection of the furs, without the permission or knowledge of the guilty parties *or* of the petitioner. In short, as previously observed, the informant's inspection of the furs may well have been the product of an unlawful search by or with the assistance of police authorities.

Certainly, if there is any reason why the petitioner should not have been allowed to attempt to show that he was not present when the informant saw the furs, that reason is not suggested within the record before your Honors.

If one may rely completely upon the prosecutor's sense of responsibility, he must presume that the suggestion of a "possible murder" was not a mere catch phrase, designed to elicit visceral indignation at the sacrifice of legal principles.

Very well, then. The informant "might . . . probably" (R. 15) become the victim of a "possible murder" (R. 22) if the court were told, even in general terms, where the informant talked to the agent, or the date on which he saw the furs in petitioner's basement (R. 22).

But from this fact, it simply does not follow that petitioner may be deprived of his liberty on evidence, the method of whose acquisition is left completely to conjecture, and which was seized on the basis of an affidavit which

was at least in part known to be untrue when filed. Nor does it follow that petitioner may be thus imprisoned without being given a reasonable opportunity to defend himself.

In short, the defendant also has rights. As was pointed out by Mr. Justice Clark in his dissent in *Roviaro*,

> "The government is fully aware of this dilemma and solves it every day by foregoing prosecutions in many cases where evidence essential to the defense would require disclosure [relating to an informant]. 353 U.S. 67, 1 L. ed. 2d 648.

It would appear that an even more effective solution to the dilemma has now occurred to the government. In this case, the prosecution has proceeded full tilt and "evidence essential to the defense" has been flatly withheld by way of preventing a "possible murder" that "might . . . probably" ensue.

III.

THE TRIAL COURT ERRED IN REFUSING TO SUPPRESS THE EVIDENCE SEIZED PURSUANT TO THE SEARCH WARRANT.

A. THE APPLICATION FOR SEARCH WARRANT WAS LEGALLY INADEQUATE.

The affidavit for search warrant recited that on a specified date, an unnamed, but previously reliable informant, told the affiant that he had seen 80 fur garments in petitioner's basement "within the past week".

It was also recited that the unnamed informant "had been told", by his own unnamed informant of conjectural reliability, that the furs had been stolen.

The foregoing are the only recitations within the affidavit which have the slightest relevance to the direct issue whether petitioner's basement should be searched.

There is nothing contained within the affidavit which would tend to afford any basis for crediting that hearsay. There is no suggestion that the unnamed informant's unnamed informant had ever previously been a source of information; and there was no apparent basis for crediting his averment.

While the affidavit did recite that the principal informant had "furnished reliable information in the past *to the Federal Bureau of Investigation*", (R. 8, Emphasis added), that averment would seem inferentially to negate the possibility that the affiant himself had ever before dealt with this informant. The F.B.I. is, after all, a very large agency with many diverse areas of interest totally unrelated to criminal matters. The basis for the affiant's belief that his informant had in the past furnished reliable information to the FBI, does not appear. If another agent told the affiant of his informant's reliability, the affiant need only have said so, since he made equivalent assertions in other portions of the affidavit with reference to other facts (R. 7, 8). If the agent learned of his informant's reliability through some other source, there is likewise no indication of reliability of that source.

The entire affidavit is based on hearsay, once and twice removed and relayed through an amorphous chain whose length cannot be determined.

It has, of course, been established that search warrants may be based in part on hearsay. Thus, in *United States* v. *Guido*, 251 F.2d 1, 7 Cir., 1958, it was held that affidavits supporting an application for search warrant might consist partly in hearsay, provided other matters appear of affiant's own knowledge. In *Jones* v. *United States*, 362 U.S. 257, 272, 4 L.Ed. 2d 697, 708 your Honors concluded

lingering doubts, holding that a warrant may be based in part on hearsay, "so long as there was a substantial basis for crediting the hearsay."

In *Jones,* the policeman affiant swore to information personally known to him. His affidavit stated that the persons whose premises were to be searched for narcotics had previously admitted their drug addiction to him. He had seen needle marks on their bodies. The informant's ". . . story was corroborated by other sources of information." 362 U.S. 271, 4 L.Ed. 2d 708.

Thus, in *Jones,* the facts satisfied the standards imposed by the court. The officer properly relied, ". . . upon information received through an informant, rather than upon his direct observations, . . . [because] the informant's statement [was] reasonably corroborated by other matters within the officer's knowledge." (*Jones,* 362 U.S. 257, 269, 4 L. Ed. 2d 697, 707.) Similarly in *Draper* v. *United States,* 358 U.S. 307, 313, 3 L. Ed. 2d 340, probable cause ensued where information from an informer was corroborated by information based upon personal observations made by an agent.

Contrast the situation in the instant case. The informant was not corroborated by other observations. He was "corroborated" by the agent's naked guess that the furs allegedly seen by the informant, but not by the agent guesser, were similar to those stolen in Alabama, which the affiant had likewise never seen.

In *Jones* v. *United States,* 362 U.S. 257, 4 L. 2d 697, 708, 725, the party to be searched was known by the police to be addicted to drugs. That fact, personally known to the officer affiant, rendered probable the notion that he might be likely to possess drugs as claimed by the con-

fidential informer. In this case, petitioner Sam Rugendorf was not known by the police, or by any agent of the FBI to have any personal characteristics which might render probable his commission of any offense whatever.

The desperate nature of the quest for corroboration, is shown by the affidavit's emphasis on petitioner's status as Leo's brother. We do not doubt that this fact provided a strong motivation for his being arrested and charged on evidence of the character at hand. However, his status as Leo's brother is utterly lacking in legal cogency. The Commissioner, in issuing the affidavit, was invited to hazard that petitioner, having made the perverse, deliberate biological choice of the same parents as Leo, had probably adopted similar moral standards as well. The novel concept of horizontal corruption of the blood, on which the officers predicated their application for a search warrant, achieved a factitious judicial acceptance through the issuance of that warrant by the Commissioner.

No investigation of any kind was attempted, although routine procedures would have done much to resolve the question of petitioner's guilt or innocence. And the affidavit itself was proven to be false, its falsity in part attributable to a misrepresentation by a government agent.

In these circumstances, the very least that can be required of the government is that it make such disclosures as would permit the defense to explore fully the issue of probable cause.

Merely to presume the existence of probable cause through the uncritical acceptance of the agent's conclusions, is to circumvent the issue completely.

We earnestly urge that where *all* of the material information in the affidavit came from confidential informers, once removed and twice removed, whole chains and relays of

them; and where, as here, *not one item* in the affidavit, material or collateral, was based on the affiant's personal knowledge; and where, as here, no slightest effort was made to corroborate the informant, and opportunities for corroboration were ignored; then, there is a failure of probable cause for a search warrant.

B. THE PROVEN FALSITY OF THE APPLICATION FOR THE SEARCH WARRANT REQUIRED THE SUPPRESSION OF THE EVIDENCE THEREBY ACQUIRED.

Lacking the requisite collateral corroboration of their confidential informant, the agents hunted around for another "usually reliable" confidential informant from their handy list of such persons. They were lucky enough to find the very man for the job. Leo Rugendorf, he said, was a fence and was associated with petitioner in the meat business. And petitioner was Leo's brother. (R. 7)

In this prosaic aspect, at least, it was considered possible to corroborate an informant. Toward that end, the affidavit quoted a Chicago policeman as saying that petitioner did indeed manage the Rugendorf Bros. Meat Market. (R. 7)

The agents thereby sought to "corroborate" their informant by a noteworthy investigative feat. They "verified" through yet another faceless informer, the fact that petitioner Sam Rugendorf was the brother of Leo Rugendorf, and quoted a Chicago police officer as authority for the proposition that they were in business together.

Thus, hearsay in the second degree was "corroborated" by falsehood in the second degree. It was proven, conclusively and without contradiction, that petitioner was not

in fact in business with his brother (R. 19-21) and that the police officer had not in fact made any such statement to the F.B.I. Agent (R. 17)

All of the "corroboration" was either legally meaningless, or totally false—false not only in what the informants had said, but equally false in the aspect of what the federal agents represented the informants to have said.

The government has argued in this court that the portions of the affidavit proven to be false "had nothing to do with the unequivocal statement of the informer that he had seen the furs in the basement of petitioner's home." (Brief in Opposition, p. 11).

On the contrary, the misinformation is very highly relevant. It is the only supposed corroboration of the informant's statement. It is the vital "substantial basis for crediting the hearsay" necessary to the issuance of a search warrant on the basis of an informer's statement. *Jones* v. *United States*, 362 U.S. 257, 269, 272, 4 L.Ed. 2d 697, 707, 708.

It follows that since the corroboration did not in fact exist, probable cause did not exist.

Moreover, demonstrated untruthfulness on the part of the officer would seem highly relevant to any determination whether he may properly be the sole judge of the existence of probable cause for a search. Even if it were otherwise proper that a court should slavishly accept the officer's conclusion that probable cause existed, such reliance would seem inappropriate when it is proven that the officer has obtained his search warrant by making a false sworn statement. The philosophy that the truth of the affidavit was immaterial so long as incriminating evidence was in fact

found, was actually adopted by the trial judge, who overruled the motion to suppress, and foreclosed further inquiry, with the following statement:

> "Even if part of the affidavit should be false, the main part of it, the material part, is true, because they actually found the garments there. Bring the jury." (R. 25).

Contrary to all accepted juridical concepts, the trial court justified the search, not on the basis of probable cause, but on the basis of what was found. But a search cannot be justified as lawful merely because the results in the disclosure of incriminating evidence. *United States* v. *Di Re*, 332 U.S. 581, 595. If the rule were otherwise, a petition to suppress could literally never succeed, and the constitutional protection against unlawful search and seizure would be totally meaningless.

But even if this highly questionable philosophy be accepted, the trial court was still in fundamental error. The question presented, even by the government's theory, was not whether there were furs in petitioner's basement. Rather, the issue was whether there was reasonable grounds to believe, at the time the search warrant was issued, that the furs were there, and whether any misconduct on the part of federal agents had generated the information. Determination of the identity of the confidential informant was very highly relevant to the resolution of that question. In view of the demonstrated falsity of the remainder of the affidavit, the defense was entitled, at least, to determine whether the confidential informant of past proven reliability existed. Such an informant was proven not to exist in *United States* v. *Pearce*, 275 F. 2d 318, 7 Cir. 1961. The defense was further entitled to determine whether the confidential informant had acquired

his information through an unlawful means, as in *United States* v. *Coplon*, 185 F.2d 629, 639, 2 Cir., 1950.

We would point out to your Honors that not a syllable nor a punctuation mark in the government's affidavit need have been different if the informant had told the government agents that he himself had placed the furs in petitioner's basement without petitioner's knowledge. The same affidavit also could have been used if the informant had been another agent, who had broken into the petitioner's basement to acquire his information.

We do not say that these things happened. We do not know. But neither can the government now say that they did not happen. The matter is left to conjecture, and conjecture is a poor repository for constitutional rights.

The obvious way to have resolved such doubts was to permit a full hearing in the trial court. But a full hearing could not occur where the government took sanctuary as to the informant's name, and as to all the events surrounding his activities.

In place of clear and explicit constitutional rights, the petitioner has been given a trial which proceeded on the assumption that government agents would not misconduct themselves. This premise is untenable in view of the demonstrated falsity of a portion of the affidavit. But in any event, it is a poor premise for a criminal prosecution, totally unworthy of constitutional government.

As Justice Learned Hand observed:

> "Few weapons in the arsenal of freedom are more useful than the power to compel a government to disclose the evidence on which it seeks to forfeit the liberty of its citizens. All governments, democracies as well as autocracies, believe that those they seek

to punish are guilty; the impediment of constitutional barriers are galling to all governments when they prevent the consummation of that just purpose. But those barriers were devised and are precious because they prevent that purpose and its pursuit from passing unchallenged by the accused, and unpurged by the alembic of public scrutiny and public criticism. A society which has come to wince at such exposure of the methods by which it seeks to impose its will upon its members, has already lost the feel of freedom and is on the path towards absolutism." *United States* v. *Coplon*, 185 F. 2d 629, 638, 2 Cir. 1950.

That the affidavit was here proven in part to be false, is entirely fortuitous, and does not affect the basic principle involved. We do not contend that accused ought be permitted information as to the identity of an informant, only where he can show falsity in some other portion of the affidavit. Lacking information concerning the informant, a defendant will rarely be able to meet this burden. Rather, we urge that a defendant should be permitted such information wherever relevant, in order that evidence thus obtained may be admitted against him only where the affidavit is *not* false, and in order that the affidavit may not be used as a subterfuge for evasion of the constitutional prohibition against unlawful search and seizure.

C. WITHHOLDING THE IDENTITY OF THE INFORMANT SHOULD HAVE RESULTED IN SUPPRESSION OF THE EVIDENCE.

The government has obtained against petitioner punitive action legally possible only if its evidence was obtained with probable cause. At the same time, it has thwarted every effort to determine whether probable cause in fact existed.

We suggest that the government may not properly rely upon a supposed fact as to which it is unwilling that evidence be heard.

"The prosecution necessarily ends any confidential character" attaching to such information. "The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully." *United States* v. *Andolschek,* 142 F. 2d 503, 506, 2 Cir., 1944.

The motion to suppress was denied. It was denied because probable cause was found to exist. Probable cause was found to exist because the defendant could not prove that there was no probable cause. The defendant could not so prove because he did not know in what the probable cause was supposed to consist. He did not know because the government refused to tell him.

In short, the court took the agent's word for the fact that there was probable cause for the search.

The legal significance is that the agent was the sole judge of whether probable cause existed.

The judicial function was never performed.

IV.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE CONVICTION.

It has never been expressly decided that one who violates Section 2315 by receiving, concealing, or storing stolen property, must do so knowingly. But if knowledge was an issue in this case, certain it is that there was no shadow of evidence on that issue.

Petitioner came into court with a background of hard and honest work, and a spotless reputation, achieved over a span of 55 years.

The government came into court with a stipulation that furs valued at more than $5,000.00 had been stolen outside Illinois, and with proof that they had been found concealed in petitioner's basement.

This was the government's entire presentation before the jury. And it must be judged in the light of certain highly relevant and uncontested facts. The defendant and his wife were absent from Chicago on vacation for a period of two weeks, beginning about one week after the completion of the theft (R. 30, 39). They left keys to their home, for emergency purposes, with a number of people: their son; petitioner's sister; a neighbor (R. 30, 39). They also left a key with petitioner's brother, Leo (R. 30, 39). And Leo was a "fence" (R. 30).

The day following petitioner's departure, Leo came into the neighborhood. He told a neighbor, Mrs. Lamm, not to worry if she saw lights in petitioner's house, because he, Leo, had a key (R. 28).

An agent and affiant for the government took solemn oath that he had reliable information that the furs had been stolen by criminal asociates of Leo, and that Leo's function was to dispose of goods stolen by the thieves (R. 7, 8).

There is no evidence that petitioner ever saw the furs prior to his arrest. There is no evidence generating so much as an inference that he knew they were in his basement.

The very most that can be said in support of the judgment of conviction, is that the furs were found in a basement closet of a residence partly owned and occupied by petitioner, but to which a number of others also had full access.

This may or may not show *constructive* possession of the furs by the petitioner. But statutory guilt consists in two elements: (1) Possession of stolen goods, (2) with knowledge of their stolen character.

From proof of actual exclusive possession of stolen property, it may be possible to *infer* guilty knowledge. But such an inference is tenable only on a showing of "control, dominion, or exercise of authority over" such property. *Pearson* v. *United States*, 192 F. 2d 681, 693, 6 Cir., 1951.

The "control" required to support guilt is a conscious control (*United States* v. *Wainer*, 170 F. 2d 603, 606, 7 Cir., 1948) and an intent to control (*United States* v. *Curzio*, 170 F. 2d 354, 357, 3 Cir., 1948).

There is no evidence that petitioner ever put a hand on the stolen furs, or ever saw them, or was ever aware of their presence in his home. In these circumstances, his "possession", if such it can be called, was constructive at best. And constructive possession "is incapable of supporting an inference that the constructive possessor knew that the goods had been stolen." *United States* v. *Russo*, 123 F. 2d 420, 422, 3 Cir., 1941.

The Court of Appeals' opinion which we ask your Honors to review, suggests that material fact issues were presented to the jury. The record will not support that assertion. The only evidentiary conflict was whether Leo had returned the keys when petitioner returned from his vacation. The government urges that the jury resolved this issue against petitioner, and argues that it is illogical to believe:

> " . . . that Leo would have placed the furs in the basement and then given away his only means of taking the furs out of the basement by returning the key to defendant . . . " (Government brief in Court of Appeals, p. 7)

The Court of Appeals has elevated this argument to the dignity of plurality, by its reference to "stubborn *facts* plainly pointing to [petitioner's] guilt."

The patent impossibility of copying a residence key at any price less than 25¢, imparts to that argument such cogency as your Honors may deem it to possess.

Not only is it far more probable that Leo is the offender; it is the simple, if absurd, fact that the case against petitioner's wife is much stronger than the case against petitioner. Petitioner's wife managed the home, and lived there throughout the day (R. 32). Petitioner merely slept there, on the normal working day (R. 39).

Assuredly, petitioner's wife is no more guilty than petitioner. The real offender was almost certainly Leo, or some other person known to the nameless informant whose identity was guarded from petitioner's inquiries. But a much stronger case, although still inadequate to support conviction, could have been made against petitioner's wife, than was made against petitioner.

The outcome of this litigation to this time cannot be pleasant to petitioner's wife. But she may at least take solace in the fortunate circumstance that she was not born as Leo's sister.

* * * *

If Section 2315 requires that the concealment or storage of stolen goods must be knowingly done in order to be criminal—and this is the obvious intent of the Statute—this would be an exceptionally felicitous occasion, from Petitioner's standpoint, for the clarification of that principle.

If Section 2315 does not so require, it would likewise be helpful if that fact were made clear, in order that the citizenry may be alerted to the necessity of periodic and

systematic inspections by them of their residences, business quarters and vehicles to assure that all is in readiness if the police should come.

And if being the brother of a suspected criminal, entitles the government to use one as a pawn in the "war against crime," it is high time we all stopped pretending to the contrary, and abandoned our time-wasting academic discussions concerning individual rights and dignity.

CONCLUSION

For the reasons herein expressed, Petitioner prays that his conviction be reversed by reason of the inadequacy of the evidence to support conviction.

In the alternative, Petitioner prays that his conviction be reversed by reason of the denial to him of his right to be informed concerning the confidential informants referred to in the government's affidavit.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 223

SAMUEL JOSEPH RUGENDORF, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (R. 69–74) is reported at 316 F. 2d 589.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1963 (R. 74). A petition for rehearing was denied on May 24, 1963 (R. 76). The petition for a writ of certiorari was filed on June 21, 1963, and was granted on October 14, 1963 (R. 76; 375 U.S. 812). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a search warrant is valid, although the underlying affidavit is based wholly on observations reported by others, where the affidavit shows on its face that there are substantial grounds for crediting the information.

2. Whether one who challenges the validity of a search warrant is entitled to disclosure of the names of confidential informants referred to in the government's affidavit supporting the warrant in the absence of evidence that the affidavit contains misrepresentations.

3. Whether defense counsel adequately asserted at the trial the claim that divulgence of the identity of one of the informants was needed by the accused in connection with his defense on the merits.

4. Whether the evidence supports the verdict.

CONSTITUTIONAL PROVISION, STATUTE, AND RULE INVOLVED

The Fourth Amendment and the pertinent provisions of 18 U.S.C. 2315 and Rule 41 of the Federal Rules of Criminal Procedure appear in the Appendix, *infra*, pp. 63–64.

STATEMENT

Following a trial by jury in the United States District Court for the Northern District of Illinois, petitioner was convicted on an indictment charging him with a violation of 18 U.S.C. 2315 (Appendix, *infra*, p. 63) in that on or about March 22, 1962, with knowledge that they were the fruits of theft, he received, concealed, and stored 81 stolen fur pieces, of a value in excess of $5,000, which had theretofore been trans-

ported in interstate commerce (R. 1, 67). Pursuant to the provisions of 18 U.S.C. 4208(a)(1), the court sentenced him to ten years' imprisonment, specifying that he should become eligible for parole after serving a minimum term of two years (R. 12). The Court of Appeals for the Seventh Circuit unanimously affirmed (R. 69–74).

The principal errors urged relate to (1) the trial court's refusal to suppress as evidence the fur garments which were seized from petitioner's home under the authority of a search warrant; (2) the refusal to require the government to disclose the names of certain confidential informants referred to in the affidavit supporting the search warrant; and (3) the sufficiency of the evidence to support the verdict of the jury. For convenience, we summarize first the evidence of guilt, and thereafter the facts pertinent to the other two issues.

1. The evidence of guilt

(*a*) The evidence adduced by the government in its case in chief was as follows:

Shortly after 5 p.m. on March 22, 1962, agents of the Federal Bureau of Investigation discovered 81 fur pieces in a basement closet in the single-family residence occupied by petitioner and his wife in Chicago (R. 15–16, 25–26). The discovery was made in the course of a search pursuant to a search warrant (R. 4–8, 15). It was stipulated at the commencement of the trial that all 81 of the furs had been stolen (22 from a fur store in Shreveport, Louisiana, in December 1961, and the remainder from a

store in Mountain Brook, Alabama, in February 1962) and that the value of the furs was in excess of $5,000 (R. 15).

Agent Marlin Moore, one of the officers who participated in the search and made the discovery, testified that the basement in which the furs were found was partitioned into two sections by a wall which ran east and west through the center of the building. The rear, or south, segment of the basement was in turn divided into two compartments, one of which was a laundry and furnace room, the other a general storage room. The north half of the basement consisted of a finished recreation room. Adjacent to its east wall was a business-type desk with a telephone. In the center of the room were a card table and a sewing machine. Two or three laundry bags filled with unwashed laundry were hanging on the east wall. Built into the north wall were three closets. The furs were found hanging on individual wire hangers from a rod which extended the length of one of these closets, all of which were closed but unlocked at the time of the agents' arrival. In the same closet was another fur piece, which petitioner's wife (who had admitted the agents to the house and was with them during the search) identified to the officers as her property. Petitioner was not at home at the time of the search (R. 15–16, 25).

Mr. Moore further testified that at the time of the discovery of the furs three large white empty bags were lying in a pile on the floor in the northwest corner of the recreation room. The agents used these bags as containers for the removal of most of

the stolen furs from the premises.[1] The remaining furs were removed in one of the laundry bags hanging on the east wall of the room when the officers arrived. Mrs. Rugendorf had authorized the use of the bag for this purpose and had removed the soiled laundry from it (R. 16).

(*b*) Following agent Moore's testimony and the receipt of the furs in evidence (R. 17, 25), the government rested its case in chief (R. 25). A motion for judgment of acquittal was thereupon made, argued, and overruled (R. 25; Tr. 133–148).[2] The defense then presented its affirmative case (R. 25–54, 59), which may be summarized as follows:

Both petitioner and his wife testified that they had no knowledge of how the stolen furs got into their basement, or even that the furs were there (R. 32, 36, 40). Both testified that they had been on a vacation in Florida from February 17 until March 4, 1962, and that from the latter date until the discovery of the furs on March 22 they had had no occasion to look into the closet in which the furs were found (R. 30–32, 40). Mrs. Rugendorf testified that, shortly before their vacation, she had taken some summer clothing from that closet and had observed no furs there (R. 31, 34); and that after her return

[1] Moore subsequently testified, in the course of his rebuttal testimony (see *infra*, pp. 9–10), that Mrs. Rugendorf gave the officers permission to use the bags for this purpose and that she stated to the agents at the time that the bags were not hers and that she had never seen them before (R. 62).

[2] "Tr." refers to the reporter's transcript, a certified copy of which is on file with the Clerk of this Court.

she had removed articles from another of the closets in the basement (R. 31–32). Petitioner, for his part, testified that he had not been in the basement at all between his return from vacation and the discovery of the furs (R. 40). Both husband and wife stated that they had frequently been away from home during this period. Petitioner said he was at home only at night except on Sundays (when he was at home after about 3 p.m.) (R. 40) and Mrs. Rugendorf that she was away three or four hours nearly every day (R. 32). During Mrs. Rugendorf's absences, she testified, the house was empty except for a dog (*ibid.*)

Both petitioner and his wife further testified that four persons other than themselves had keys to their home during their vacation—their son, a neighbor, petitioner's brother Leo, and petitioner's sister (R. 30, 39; Tr. 200–201, 259). Leo Rugendorf was a known "fence", or receiver of stolen property.[3] The theory of the defense, as articulated by counsel in his summation (Tr. 535–541, 543–547, 554), was that Leo had placed the stolen furs in the basement without petitioner's knowledge. Petitioner testified that on February 17, the day he left on vacation, Leo came to his place of business and offered to look after the house and take in the mail during his absence; that petitioner, after initially refusing, accepted Leo's proposal and gave him the key to the house; and that Leo had never returned the key (R. 39; Tr. 261–264).

Mrs. Rose Lams, who lived next door to petitioner, testified that on February 18, the day after the

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[3] Chicago police officer James Kelleher testified that Leo was known to him as a receiver of stolen goods (R. 30).

Rugendorfs' departure for Florida, a man who introduced himself as petitioner's brother Leo came to her house and told her that petitioner had given him the key to his residence and that if she saw lights on at night she should not call the police (R. 28). The witness never say her caller again (*ibid.*).

(*c*) In rebuttal of petitioner's assertion that his brother Leo had never returned the key, F.B.I. agent Richard Lee, one of the arresting officers, testified that petitioner told him, on the evening of his arrest, that Leo—two and a half weeks previously, and not long after petitioner's return from vacation—*had* brought the key back (R. 63, 64). (Petitioner, in addition to testifying that Leo never returned the key, denied on cross-examination that he had ever told the arresting officers that the key had been returned (R. 45).)

In further impeachment of petitioner's credibility and that of his wife, the government presented additional rebuttal testimony sharply contradicting, in numerous details, their versions of the relevant events. Among the instances of conflict were the following:

(i) Petitioner testified that while he was being driven by the arresting officers to the local headquarters of the F.B.I., the officers asked him where they could find his brother Leo, where Leo's meat market was located, and how many furs Mrs. Rugendorf owned; that he replied she had four and stated how old the furs were; that the officers then inquired what he was going to do with the "rest of" the furs; and that they kept "pounding" him with questions

about furs throughout the drive (R. 40; Tr. 270–271, 303). Agent Lee, one of the arresting officers, denied that any such exchanges had taken place (R. 63; Tr. 394–395).

(ii) Petitioner testified that at the F.B.I. offices, after a period of interrogation lasting an hour or an hour and one-half, he began screaming to the agents that he was a diabetic, had had nothing to eat all day, and "needed Orinase" (R. 41; Tr. 274). Agent Lee, on the other hand, testified that immediately following their arrival at F.B.I. headquarters they took petitioner to the fingerprinting room; that during the course of the fingerprinting they asked him various "background questions" for "descriptive purposes," such as whether he had had any military service; that he replied in the negative and disclosed his diabetic condition; that, as soon as he told the officers this, they asked him if he desired medication or food; that he declined both, explaining that while his medication consisted of four Orinase tablets daily (two to be taken with his breakfast and two with his supper), he had no particular eating schedule and was not on a rigid diet; that on four subsequent occasions during petitioner's detention in the F.B.I. offices, at thirty-minute intervals, the agents offered him food and Orinase, which in each instance he declined; that, later in the evening, while the agents were driving petitioner from the F.B.I. headquarters to the Chicago Police Department, they stopped at a drug store and obtained four Orinase tablets; and that at no time, from the moment of his arrest until his delivery at

the police station, did petitioner ever scream that he needed food or Orinase (R. 63; Tr. 395–397).

(iii) Petitioner testified that the officers told him at F.B.I. headquarters that they knew his brother Leo had put the stolen furs in petitioner's basement, and that if he (petitioner) would so state he could go home immediately; that petitioner, asked by the agents where Leo was, replied that he did not know; that, at the instigation of the officers, who dialed the numbers for him, he called Leo's home and the home of his sister Rose in unsuccessful efforts to locate Leo for the officers; that the officers asked him to swear on his mother's grave that he knew nothing about the furs; and that he replied that he would not only so swear on his mother's grave but would take a similar oath on his father's grave and would be willing to take a lie-detector test to prove his innocence (R. 42–44; Tr. 278, 280–284). Each of these allegations was denied by Agent Lee (R. 64–65; Tr. 398, 401). The agent testified that it was petitioner who suggested to the officers the likelihood that his brother Leo had put the furs in petitioner's basement; that petitioner was desirous of getting in touch with his brother; and and that the officers permitted him to use the telephone for this purpose (R. 64; Tr. 398–401).

(iv) Mrs. Rugendorf testified that on the occasion of the discovery of the stolen furs by the F.B.I. agents, one of the agents stated to her that the officers knew that her brother-in-law Leo had been a source of embarrassment and humiliation to her and her family (R. 32–33, 36). Agent Moore denied that any

such statement was made (R. 61). He testified that it was Mrs. Rugendorf who injected Leo Rugendorf's name into the conversation, saying that "This looks like another instance where Leo has gotten Sam [petitioner] in trouble and caused us embarrassment" (R. 62).

(v) Mrs. Rugendorf was asked on cross-examination whether she did not say to the officers, after reading the search warrant which they served on her, that she and her husband had been on vacation, that if there was anything in their basement that was stolen they knew nothing about it, and that it must have been put there in their absence by Leo. Her answer was negative (R. 35). Agent Moore testified in rebuttal that she had made this statement (R. 61).

(vi) Mrs. Rugendorf testified that the three white bags (into which most of the seized furs were placed by the officers) were not on the recreation room floor when the officers arrived, as Agent Moore had testified (*supra*, pp. 4–5), but were in the closet with the furs and not visible until the closet door was opened (R. 33, 36). She stated that when the bags were removed from the closet she told the officers she had never seen them before (R. 36). Agent Moore denied, in rebuttal, that the bags were in the closet, reiterating his testimony in chief that they were lying in plain sight on the floor of the room when the officers and Mrs. Rugendorf entered the basement (R. 62).

(vii) Mrs. Rugendorf was interviewed by Assistant United States Attorney Robert Monaghan at the latter's office on the day following the discovery

of the furs (R. 33, 59). She testified that Mr. Monaghan stated, among other things, that the government had learned about the presence of the furs in her basement from an informant who had given information on prior occasions; that the government knew her husband was not responsible for the furs' being there; and that both she and the government knew that it was her brother-in-law Leo who was responsible, since Leo was a well-known "fence" who had acted as such for two associates of his named Panzica and Condick (R. 33, 34, 37). Mr. Monaghan denied having made any of these statements to the witness (R. 59).

2. The proceedings on the motions to suppress and to require disclosure of the names of the government's confidential informants

The discovery of the furs was made in the course of a search pursuant to a commissioner's search warrant (R. 4–5, 15–16). Prior to trial, petitioner, pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure (Appendix, *infra*, p. 64), moved to suppress the use of the seized garments as evidence on the ground of alleged deficiencies in the affidavit supporting the warrant (R. 1–8). Following argument of counsel and an evidentiary hearing, the motion was denied (R. 17–25). Also denied was a motion to require the government to disclose the names of certain confidential informants, referred to in the affidavit, who had supplied information relied upon in part by the affiant officer as grounds for seek-

ing the warrant (R. 13–15). The relevant facts pertaining to these proceedings are as follows:

(*a*) The affidavit (R. 6–8) was executed on March 22, 1962,[4] by agent Moore. It stated that the affiant had reason to believe that about 80 fur garments, consisting of stoles and jackets approximating $40,000 in value, which had been stolen in Mountain Brook, Alabama, on or about February 10, 1962, were concealed in the basement of a single-family residence located at 3117 West Jarvis Avenue, in Chicago, Illinois (R. 6). The supporting grounds, as set forth in the affidavit, were as follows:

The affiant received a communication from Special Agent L. Dean Paarmann, of the Birmingham, Alabama, Office of the F.B.I., stating that on February 10, 1962, a burglary had taken place in Mountain Brook, Alabama, in which 82 fur garments, valued at approximately $42,044, were stolen (R. 6). Agent Paarmann's communication described the garments as consisting of mink, otter, and beaver stoles and jackets (the majority being mink) and reported that no full-length coats were among them (R. 6–7). Another F.B.I. agent, W. J. McCormick, advised the affiant that a confidential informant, who had furnished reliable information to the F.B.I. in the past, had told McCormick that Frank Schweihs, of Chicago, together with others, had committed the Alabama burglary; that, on or about March 1, 1962, James Kelleher, a Chicago police officer, had told McCormick

[4] This was also the date of the warrant and of the search pursuant thereto (R. 4–5, 15).

"that he saw FRANK SCHWEIHS at RUGGENDORF BROTHERS MEAT MARKET, managed by SAMUEL RUGGENDORF, at 2449 South Wentworth Avenue, Chicago, Illinois"; and that another confidential informant who had proved reliable in the past had told McCormick that Leo Rugendorf was a fence for Frank Schweihs, that Samuel Rugendorf was Leo Rugendorf's brother, and that Samuel was associated in the meat business with his brother (R. 7). A third F.B.I. agent, J. J. Oitzinger, notified the affiant that a confidential informant who had supplied the F.B.I. with reliable information in the past had told Oitzinger that Frank Schweihs, Tony Panzica, and Mike Condic were accomplished burglars who disposed of the proceeds of their burglaries through Leo Rugendorf. On March 16, 1962, a confidential and previously reliable informant told the affiant that he had seen approximately 75 to 80 fur garments in the basement of the home of Samuel Rugendorf, at 3117 West Jarvis Avenue, in Chicago, during the preceding week; that the garments he had seen consisted of mink, otter and beaver stoles and jackets (the majority being mink), from which the labels had been removed, and that no full-length coats were among them; and that the informant had been told the furs he had seen were stolen property. Finally, upon checking the informant's description against descriptions of furs taken in burglaries throughout the United States during the preceding six months, the affiant determined that the only reported burglary involving furs similar to those described by the

informant was the one which occurred in Mountain Brook, Alabama, on February 10, 1962 (R. 8).

(*b*) The motion to suppress challenged the validity of the affidavit on two grounds: (1) that it was untrue, and (2) that it was insufficient in law to establish probable cause for the issuance of a search warrant, in that it was based solely upon the belief of the affiant and "unsupported hearsay" (R. 2). Prior to the court's disposition of the motion, defense counsel, after the jury was empaneled but before the presentation of any evidence, orally moved that the government be required to supply the defense with the names of the confidential informants referred to in the affidavit (R. 13).

In the course of oral argument on the motions (R. 13–15; Tr. 9–26)—still prior to the commencement of the trial proper—defense counsel, citing this Court's decision in *Roviaro* v. *United States,* 353 U.S. 53, maintained "if the names of the informants are necessary to a proper defense or a proper presentation of the defendant's case in attacking the search warrant, then in the interest of justice it must be given to the defendant" (R. 13, as corrected at R. 75; Tr. 15). Counsel then proceeded to "demonstrate how in our opinion the names of the informants are necessary" (R. 13). The affidavit, counsel stated, contained (*ibid.*)—

> * * * certain factual errors. These facts, if they came from an informer, are false facts, so maybe they did not come from an informer, or, if they came from an informer then we are entitled now to cross examine the informer. May-

be he did not give the information, if the confidential informer is so wrong about the facts.

Two factual inaccuracies were cited by counsel—the statements that Samuel Rugendorf (petitioner) was the manager of Rugendorf Brothers Meat Market and that Samuel was associated in the meat business with his brother Leo (R. 14).[8] "Sam Rugendorf was not the manager of Rugendorf Brothers Meat Company," said counsel, and he had not been associated with the company since 1952—assertions which counsel offered to prove (*ibid.*).

In the course of his argument defense counsel declared (R. 14):

> They say, to get their search warrant, that a confidential informant who has furnished reliable information in the past to the Federal Bureau of Investigation told this affiant, Mr. Moore, who made the affidavit, told them on March 16, 1962 that he saw approximately 75 to 80 fur garments in the basement of the home of Samuel Rugendorf at 3117 West Jarvis, Chicago, Illinois, within the past week, that is, within the week prior to March 16.
>
> I would suggest that not only is this informant necessary to the defendant because if he takes the stand it will demonstrate that Sam Rugendorf had nothing to do with it, or possibly his falsity, but I would suggest that perhaps he would be a pretty good witness for the

[8] It will be noted that only the second of the statements referred to by counsel was attributed by the maker of the affidavit to an *unnamed* informant. See *supra*, pp. 12–13, and *infra*, pp. 48–49.

Government, that they ought not to want to hide the witness, that he would pretty much make out a case for the Government.

Government counsel, in opposing the motion to compel disclosure of the names of the confidential informants, represented to the court, and offered to present testimony, that if the government were to reveal the identities of any confidential informants "they might and probably would be killed" (R.15).

At the conclusion of the argument, the court denied the motion to require disclosure of the names of the informants, denied the motion to suppress insofar as it challenged the legal sufficiency of the affidavit, and reserved ruling on the motion to suppress insofar as it attacked the affidavit's truthfulness (R. 15; Tr. 26–27).

(*c*) The prosecution thereupon presented its case in chief (R. 15–17). At its conclusion, but prior to the admission in evidence of the seized furs, the jury was again excused and a hearing held on the reserved aspect of the motion to suppress, *i.e.*, the charge that the affidavit supporting the warrant was false (R. 17–25). The evidence adduced at this hearing was, in pertinent part, as follows:

Petitioner was not the manager of Rugendorf Brothers Meat Market and was not associated in the meat business with his brother Leo (R. 19, 20, 21). The market bearing that name was a corporation whose manager and principal current owner was one Max Siegel, a brother-in-law of petitioner and Leo (R. 21; Tr. 112–113). While Leo was a sales-

man for the market, he had no proprietary interest in it (R. 21; Tr. 113). Petitioner owned and operated, in partnership with his wife and son Jerome, a different meat market, with which Leo had no connection (R. 18–19). Aside from occasional purchases from Rugendorf Brothers Meat Market, petitioner had had no connection with that business since approximately 1952, at which time the market of that name was located at a different address (R. 19, 20, 21). Prior to 1952 petitioner had been the owner of Rugendorf Brothers Meat Market (R. 19; Tr. 87–88).[4]

With respect to the affiant's statement that he had been told by Agent McCormick that Chicago police officer James Kelleher had reported seeing "FRANK SCHWEIHS at RUGGENDORF BROTHERS MEAT MARKET, managed by SAMUEL RUGGENDORF, at 2449 South Wentworth Avenue * * *" (R. 7; *supra*, pp. 12–13), Officer Kelleher testified that, although he did tell McCormick that he had seen Schweihs at the market in question, he did not say the market was managed by Samuel Rugendorf (R. 17). Following Kelleher's testimony, defense counsel indicated to the court that in the light of Kelleher's testimony it would be necessary to question Agent McCormick in order to determine the source of the erroneous information that Samuel Rugendorf was the manager of the market, but that McCormick was in the hospital (R. 18). No continuance was sought, however, nor did counsel

[4] Petitioner subsequently further explained, at the trial proper, that from 1947 to 1952 he and his brother Leo had been associated together in the meat business—whence the name Rugendorf Brothers (Tr. 253–254).

request that the testimony be obtained by deposition.[7]

Following argument of counsel (R. 22–25), the court denied the motion to suppress (R. 25). In response to defense counsel's argument that he had "demonstrated the falsity" of the affidavit by showing that petitioner did not manage Rugendorf Brothers Meat Market and that Officer Kelleher had not so stated to agent McCormick, the court replied that "Even if part of the affidavit should be false, the main part of it, the material part, is true, because they actually found the garments there" (R. 24–25).

(*d*) In the course of this second hearing on the motion to suppress, the defense again attempted, through questions directed to agent Moore (whom it called as a witness) to ascertain the identity of the informant who reported to Moore that he had seen furs in petitioner's basement during the week preceding March 16, 1962 (R. 22). The court sustained government objections to these questions, including a question as to where the agent's conversation with the informant took place and the exact day on which the informant had seen the furs (*ibid.*).[8]

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[7] Counsel merely said, "I say that I am in difficulty. I don't know what to do with respect to that, but I will proceed" (Tr. 83). He then proceeded with the calling of other witnesses (R. 18–22).

[8] Government counsel objected to the question as to the place of the conversation on the ground that "to reveal the place of the conversation would be to reveal the identi[t]y of the informant," counsel again representing to the court that disclosure of the names of the informants "would cause a possible murder" (R. 22; Tr. 118–119). The prosecutor objected, for the "same reason," to the question as to the day on which the informant saw the furs (R. 22).

Following these rulings by the court, a colloquy ensued in which defense counsel argued to the court that he needed the information as to the specific day on which the informant saw the furs in order to defend his client (R. 22–24). Counsel argued that he had to "account for the activities of Sam Rugendorf on the day the confidential informant says he saw" the furs in petitioner's basement (R. 23). The court replied that if the government ever offered the informant as a witness the defense would be fully informed, and pointed out to counsel that the government had stated that it would not use the informant as a witness. Counsel said, "I understand, but I need that information to defend my defendant, your Honor" (R. 23). Citing *Roviaro* v. *United States*, 353 U.S. 53, counsel argued that the defense was entitled to some information about the informant, and that "even if the Court denies my motion that we be given his name, denies the motion about where the conversation took place, can we at least not have the date on when it took place so Sam Rugendorf can defend himself?" (R. 24). The court, however, adhered to its original ruling, the trial on the merits was resumed in the presence of the jury and the defense proceeded to put in its evidence (R. 25 *ff.*).

As pointed out above (pp. 5–7), the defense consisted, *inter alia*, of testimony by petitioner and his wife that neither had any knowledge of the presence of the stolen furs in their basement until the discovery of the garments by the F.B.I. agents under a search warrant, and the argument that petitioner's

brother Leo must have placed the furs in the basement without petitioner's knowledge or consent. At no point during the trial itself did defense counsel raise any further question as to the identity of the confidential informant who had reportedly seen the furs in the basement.

SUMMARY OF ARGUMENT

I

Petitioner's contention that the affidavit in support of the search warrant failed to establish "probable cause," in that it was founded on "hearsay", is disposed of by *Jones* v. *United States*, 362 U.S. 257, 267–272. There it was held that a search warrant is not invalid merely because the supporting affidavit is based on the reported observations of others, so long as there is a substantial basis for crediting the information. Here, as in *Jones*, the face of the affidavit disclosed substantial grounds for believing the information relied upon. Petitioner's attempt to distinguish *Jones* on the ground that there the corroborating data included a fact personally known to the affiant is without substance.

II

A. We deal next with petitioner's contention that he was entitled to the names of the confidential informants referred to in Agent Moore's affidavit, for the purpose of suppressing evidence obtained by the search. The identity of the informants is not relevant to the issue of the legal sufficiency of the affidavit on its face, but only to the question whether the affiant

misrepresented to the Commissioner his basis for seeking the warrant—*i.e.*, whether he procured the warrant by fraud. *Jones* v. *United States, supra.*

B. It is our basic position that one who demands the disclosure of confidential informants for the alleged purpose of showing that the warrant was procured by fraud must first come forward with some evidence indicating that a fraud has in fact been committed upon the magistrate. A contrary holding would accord no weight to the important public policy which underlies the government's historic privilege "to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law." *Roviaro* v. *United States,* 353 U.S. 53, 59. The privilege, as we show, is an essential prerequisite to enlisting the cooperation and assistance of confidential informants. In its absence, law-enforcement officials could not assure the anonymity of those sources and thereby shield them from reprisals at the hands of those whose criminal activities they expose. Nothing could more swiftly choke off the sources of information available to the law-enforcement community than to deprive it of the authority to give this assurance. We submit that the interest of the public in keeping open the government's channels of information is entitled to greater respect than the defendant's interest in conducting a fishing expedition on the off-chance of turning something up.

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The decisions requiring disclosure of informants where the issue is "probable cause" for a search without a warrant are distinguishable; the government's privilege has a far stronger claim to recognition where, as here, a warrant has been obtained. In the latter case, the accused is not dependent solely upon the district court for the protection of his Fourth Amendment rights. The magistrate has already provided a bulwark against official irresponsibility. The showing of "probable cause" which an officer makes in an affidavit prior to a search is, for several reasons, less likely to overstate or embellish the evidence than one which he formulates for the first time in a suppression hearing subsequent to a search without warrant.

C. (1) In the present case, petitioner made no showing which would justify an exception to the privilege. He offered no proof, and indeed made no allegation, which cast the slightest doubt upon the crucial representation in the affidavit—*i.e.*, that a previously reliable informant had seen 75 to 80 unlabeled furs in his basement. If anything, the theory of the defense tended to confirm that representation. And the description of the furs included details that could only have been known by one who actually saw the garments in the Rugendorf basement.

The two minor inaccuracies in the information described in the affidavit in no way impugn the affiant's veracity. First, the items in question were not presented as facts within the affiant's own knowl-

edge; both were communicated to him by others. Second, both items were, at most, of peripheral relevance to the showing of probable cause. Third, there is no reason to believe that either inaccuracy was anything more than an honest, and quite natural, mistake of fact.

(2) If the trial court was correct in refusing to compel the identification of the informant who saw the furs in petitioner's basement, by the same token the court properly sustained government objections to questions (the date on which the informant saw the furs and the place of his conversation with Agent Moore) which, if answered, might have had that same consequence.

III

Petitioner also urges that he was entitled to the name of the informant who saw the furs in order properly to defend himself on the merits. He suggests that the informant, by testifying as to the circumstances in which he gained admission to the house, would almost certainly establish petitioner's guilt or innocence. Had this claim been adequately asserted in the district court, it might well have justified disclosure under *Roviaro* v. *United States*, *supra*. But petitioner did not properly raise in the trial court the issue whether he was entitled to disclosure for purposes of his defense on the merits. Still less did he articulate the supporting theory on which he now rests that claim.

The demands for identification of the confidential

informants were, without exception, made in connection with the proceedings on the motion to suppress, at a time when the principal focus of inquiry was the validity of the search. In this context, such allusions as there were to the possible utility of the information in connection with defense on the merits were too oblique to apprise the court of the nature of petitioner's claim. Indeed, there is reason to believe that the argument now advanced did not even occur to defense counsel until long after the trial was over.

Petitioner also demanded, for purposes of defense, the exact date on which the informant claimed to have seen the furs. But, as to this information, he fails to meet the *Roviaro* test—*i.e.*, he cannot show that the knowledge would have materially aided his defense.

IV

The evidence was clearly sufficient to support the conviction. Where a defendant is found in possession of stolen property a short time after the theft, and comes forward with no satisfactory explanation, it is well settled that the jury may infer the element of guilty knowledge. *Wilson* v. *United States*, 162 U.S. 613, 619. Here the jury was plainly entitled to reject the proffered explanation—one that required it to believe that a thief or receiver would deposit a large number of "hot" furs in the closet of a regularly used basement recreation room in the home of a completely innocent and unknowing third person, *i.e.*, a person who could be expected to call the police the moment he chanced upon the loot.

ARGUMENT

I

THE SEARCH WARRANT WAS VALID SINCE THE SUPPORTING AFFIDAVIT, THOUGH BASED ON THE OBSERVATIONS OF OTHERS, SHOWED ON ITS FACE SUBSTANTIAL GROUNDS FOR CREDITING THE INFORMATION

In *Jones* v. *United States*, 362 U.S. 257, 267–272, this Court held that a search warrant is not invalid merely because the supporting affidavit is based on the reported observations of others, so long as there is a substantial basis for crediting the information. That holding is dispositive of petitioner's contention that the affidavit in the instant case was legally inadequate because founded on hearsay (Pet. Br. 31–35). For here, as in *Jones*, the face of the affidavit disclosed substantial grounds for crediting the information relied upon.

The affidavit stated, in pertinent part, that the officer-affiant had received a communication from a named agent attached to the Birmingham Office of the F.B.I. reporting that 82 fur garments, consisting of approximately $42,044 worth of mink, otter, and beaver stoles and jackets (the majority being mink, and there being no full-length coats among them), had been stolen in a burglary in Mountain Brook, Alabama, on a specified date approximately six weeks previously; that the affiant had further been told, six days prior to the date of the affidavit, by a confidential informant who had furnished reliable information to the F.B.I. in the past, that he had seen, during the week preceding his report to the affiant, approximately 75 to 80 fur garments, consisting of

mink, otter, and beaver stoles and jackets (the majority being mink, and there being no full-length coats among them), in the basement of petitioner's home in Chicago; that the informant had further told the affiant that the labels of the garments had been removed and that he had been told that the furs had been stolen; that the affiant had compared the description of the furs reportedly seen by the informant with the descriptions of furs taken in burglaries throughout the United States during the preceding six months and that the only reported burglary involving furs similar to those described by the informant was the one which had occurred six weeks previously in Mountain Brook, Alabama (R. 6–8; *supra*, pp. 12–14). While additional corroborative details were included in the affidavit, the foregoing were plainly enough to give probable cause for the belief (a) that stolen property was concealed in petitioner's house, and (b) that the property was the fruit of an out-of-state theft.

Here, as in *Jones*, the information which led to the warrant's issuance came from an unnamed confidential informant. Here, as there, specific reasons for crediting the informant's story were cited in the affidavit. In both cases the corroborative support included the fact that the informant had given accurate information in the past. In the instant case, indeed, the grounds for believing the informant's report were far stronger than in *Jones*. There, the property reportedly seen in the accused's apartment, heroin, was described by the informant in the most general terms—simply by means of its generic name.

Here, on the other hand, the merchandise seen in petitioner's basement was described in great detail. This description, the agent found, corresponded almost exactly with the description of the fruits of a known theft, committed six weeks earlier and independently reported to the affiant through regular F.B.I. channels. Since there was no reason for the informant to know of the missing furs, the affiant could confidently conclude that his informant had in truth seen what he claimed to have seen in the basement of petitioner's home, and that his story was not a falsification.

Petitioner's attempt to distinguish *Jones* on the ground that there the bases for crediting the information included a fact personally known to the officer-affiant (*i.e.*, that Jones and the woman with whom he shared the apartment were users of narcotics) (Pet. Br. 33) is wholly without merit. The proposed distinction can hardly be reconciled with the Court's observation, crucial to the rationale of the *Jones* decision, that "[i]f an officer may act upon probable cause without a warrant *when the only incriminating evidence in his possession is hearsay* [referring to *Draper* v. *United States*, 358 U.S. 307], it would be incongruous to hold that *such evidence presented in an affidavit* is insufficient basis for a warrant" (362 U.S. at 270; emphasis added). Fundamentally, the test laid down in *Jones* is whether the secondary information relied upon by the affiant has a substantial claim to credibility, not whether that claim happens to derive from facts personally known to the officer. While the Court did point out, in the course

of its discussion, that Jones was known "by the police"* to be a user of narcotics (362 U.S. at 271), it did not single out that factor as having special significance. And, in any event, the factor has its counterpart in the present case. Here, too, facts disclosed by the informant (the description of the furs in the basement) were corroborated by facts independently obtained by the affiant through regular and official F.B.I. channels (the description of the garments involved in the Alabama burglary).

Finally, the contention that the corroborative prop for an informant's report must include something personally known to the affiant is refuted by the very nature of probable cause. "In dealing with probable cause, * * * as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar* v. *United States*, 338 U.S. 160, 175. Information reported by others, as has been cogently observed, while generally inadmissible in a court of law, is "the kind of information by which

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*It is not clear from the affidavit in *Jones* whether the affiant, as distinguished from other officers of the narcotics squad, had *personal* knowledge that the occupants of the apartment were narcotics users. The relevant language of the affidavit was as follows: "Both the aforementioned persons [Jones and the woman with whom he lived] are familiar to the undersigned and other members of the Narcotic Squad. Both have admitted to the use of narcotic drugs and display needle marks as evidence of same" (362 U.S. at 267, n. 2). The affidavit did not state that the admissions referred to were made personally to the affiant or that the affiant had witnessed the needle marks himself.

most of us live and through which we govern most of our daily life * * *." Harney and Cross, *The Informer in Law Enforcement* (1960), p. 15. The degree of credit to which such intelligence is entitled may depend upon a variety of factors, including the known reliability of the informant, the manner in which the informant himself obtained the data, and the existence of corroboration from other secondary sources.[10] Whether the disclosure is confirmed by facts within the personal knowledge of the agent called on to evaluate it is another relevant factor, and may in some circumstances be decisive. But the absence of personal corroborative knowledge does not automatically render the information unworthy of belief. That depends on all of the circumstances—the significance of each element of the entire situation in the light of human experience.

II

PETITIONER WAS NOT ENTITLED TO THE NAMES OF THE GOVERNMENT'S INFORMANTS FOR PURPOSES OF SUPPRESSING EVIDENCE OBTAINED BY THE SEARCH

Petitioner urges that he was entitled to the names of the informants referred to in Agent Moore's affidavit, despite the government's traditional privilege not to reveal the identity of its confidential sources and

[10] A familiar example of information reported by others which can reasonably be credited, though wholly uncorroborated by personal knowledge, and though the factor of known prior reliability is also absent, is the reporting of the same event or occurrence by two or more persons known to be independent. The several sources of information in such a situation, by corroborating *one another*, minimize or may even eliminate the possibility of error or untruth. Cf. Harney and Cross,

thereby expose them to possible retaliation. Petitioner demanded those names—particularly that of the informant who claimed to have seen the furs—in the course of the pre-trial proceeding on the motion to suppress the evidence obtained by the search. He renewed the demand in the further hearing on the motion to suppress which immediately followed the government's case-in-chief. In addition, petitioner requested certain collateral information relating to the informant who saw the furs—specifically, the date on which he allegedly saw them and the place at which the intelligence was communicated to Agent Moore. The trial court denied the request and sustained the privilege.

Petitioner claims that he had a right to the names for two reasons: (1) because the testimony of the informants might aid him in showing that the items of evidence sought to be suppressed (the furs) were the fruits of an unlawful search and seizure; and (2) because the testimony might be helpful to his defense on the merits. The two asserted reasons present separate legal issues. In *Roviaro* v. *United States*, 353 U.S. 53, 60–61, this Court held that in appropriate circumstances the government's privilege must give way where "the disclosure of an informer's identity * * * is relevant and helpful to the defense of an accused * * *." But the Court has not defined the standard to be ap-

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op. cit. supra, p. 15: "[S]eparate pieces of hearsay information from entirely independent sources, which triangulate on the same suspect, may point to his guilt with Euclidean exactitude." See also *Jones* v. *United States*, *supra*, 362 U.S. at 271, and cf. *supra*, p. 27.

plied where the names of the informants are sought for the purpose of challenging the validity of a search conducted pursuant to a duly issued search warrant. We turn now to that question.[11]

A. In this aspect, the identity of the informants is relevant only to the question whether the affidavit in support of the search warrant contains material misrepresentations

At the outset it is important to define the precise aspect of the search and seizure issue upon which the testimony, and hence the identity, of the informants may have bearing. The point to be stressed is that disclosure of the government's confidential sources can be justified, if at all, only for the narrow purpose of enabling the accused to show that the affidavit supporting the search warrant contains material misrepresentations—in effect, that the warrant was procured by fraud. In *Jones* v. *United States, supra,* this Court rejected the contention that a search warrant is vitiated by the failure of the affiant officer to identify his informants, where the sole issue is the legal sufficiency of the affidavit on its face[12] (the issue

[11] The separate question whether petitioner was entitled to the names in aid of his defense is discussed in Point III, *infra.*

[12] The Court stated (362 U.S. at 271–272) that: "If the objections raised were that Didone [the affiant] had misrepresented to the Commissioner his basis for seeking a warrant, these matters might be relevant. Such a charge is not made. All we are here asked to decide is whether the Commissioner acted properly, not whether Didone did. We have decided that, as hearsay alone does not render an affidavit insufficient, the Commissioner need not have required the informants or their affidavits to be produced, or that Didone have personally made inquiries about the apartment, so long as there was a substantial basis for crediting the hearsay."

discussed in Point I, *supra*). The Court held that the identity of the informants is not relevant to the issue of "probable cause" as such—the propriety of the Commissioner's action in issuing the warrant—but only, at most, to the question whether the officer who executed the affidavit engaged in fabrication. That question, left open in *Jones*, is squarely presented here, for petitioner's motion to suppress explicitly attacked the veracity of the affidavit (*supra*, p. 14).

This Court has never had occasion to decide the extent to which a trial court may look behind a search warrant which (a) is valid on its face and (b) was duly issued by a magistrate on the basis of an affidavit which, on its face, meets the standard of "probable cause" laid down in *Jones*. There is good reason to believe that such a warrant, as well as the ensuing search, should be accorded a conclusive presumption of validity, much like the indictment duly returned by a grand jury. See *Costello* v. *United States*, 350 U.S. 359. We find it unnecessary to urge that proposition here. For purposes of this argument we assume that the trial court, in ruling upon a motion to suppress, may properly consider evidence designed to show that the affidavit supporting the warrant was executed in bad faith and contains material misrepresentations.[13]

[13] This is not to say, of course, that the search would be vitiated merely if the information upon which the affiant relied ultimately proved to be false. The officers do not vouch for the accuracy of the information but only for the prior reliability of their source. The controlling test, established by this Court, is whether "the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to war-

B. The government is not required to betray its confidential sources unless independent evidence casts serious doubt upon the integrity of the representations in the affidavit

1. The government's privilege not to identify its confidential informants is fundamental to effective law enforcement and should give way only where compelling justification is shown

It is our basic position that one who demands disclosure of the government's confidential sources in order to show that a search warrant was obtained by misrepresentation must show that there is reason for apprehending that a fraud has in fact been committed upon the magistrate. To hold otherwise would give no weight to the important public policy which underlies the government's historic privilege "to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law." *Roviaro* v. *United States*, 353 U.S. 53, 59. This privilege, the roots of which lie deep in the soil of English law,[14] has often been referred to in the decisions of this

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rant a man of reasonable caution in the belief that" the described property will be found at the described premises. *Carroll* v. *United States*, 267 U.S. 132, 162; *Brinegar* v. *United States*, 338 U.S. 160, 175–176; *Draper* v. *United States*, 358 U.S. 307, 313. Thus, if the affidavit is legally sufficient on its face, the only question which might remain open in a suppression proceeding is not whether the affiant was misinformed, but whether he misrepresented to the magistrate the basis and extent of his information. It is in relation to that question alone that the defendant's right to compel disclosure of the government's sources must be assessed.

[14] See, *e.g.*, *Rex* v. *Akers*, 6 Esp. 125, 170 Eng. Rep. 850 (1790); *The Trial of Thomas Hardy*, 24 How. St. Tr. 199, 808–809, 816, 818, 819 (1794); *Hqme* v. *Bentinck*, 2 Brod. & B. 130, 162, 129 Eng. Rep. 907, 920 (1820); *Attorney-General* v. *Briant*, 15 M. & W. 169, 184–185, 153 Eng. Rep. 808, 814–815 (1846); *Marks* v. *Beyfus*, L.R. 25 Q.B.D. 494, 498, 500 (1890).

Court. See *Vogel* v. *Gruaz*, 110 U.S. 311, 316; *In re Quarles and Butler*, 158 U.S. 532, 535–536; *Scher* v. *United States*, 305 U.S. 251, 254; *Roviaro* v. *United States*, *supra*. Its essential purpose, as the Court observed in *Roviaro*, is the furtherance and protection of the public interest in effective law enforcement (353 U.S. at 59). The privilege "recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, *by preserving their anonymity*, encourages them to perform that obligation" (emphasis added). *Ibid.*

With the emergence of organized crime on an unprecedented scale, the interest of society in protecting and fostering the privilege has become increasingly evident. To be sure, the informer is less likely than in former days to be a citizen of blameless reputation who, having chanced to learn of the commission of an offense, reports what he knows to the proper authorities out of a sense of civic duty. More often he is himself a member of the criminal classes or an associate of criminals, who elects, for one of a variety of reasons (see Harney and Cross, *The Informer in Law Enforcement* (1960), pp. 32–38), to cooperate with enforcement authorities.

But whether the informer acts out of a sense of civic obligation or responds to some less worthy motive, the maintenance of his anonymity is a critical factor in encouraging him to come forward and report what he knows. To those for whom crime is a way of life, the informer is the most feared and hated of persons. He "is the underworld's most dangerous

threat," "the Achilles heel of the single thief, the ticking time bomb which might explode to blow apart the small mob or big organized crime." Harney and Cross, *op. cit. supra*, p. 4. Not surprisingly, therefore, the ability of enforcement officials to give the informer appropriate assurance of anonymity is often an essential prerequisite to inducing his assistance and cooperation. Nothing could more swiftly choke off the sources of information available to the law-enforcement community than to deprive it of authority to give such assurance. If an officer were routinely required to divulge the sources of his confidential information, then, as an English authority has observed, "the ultimate and undoubted effect would be to discourage informants and to make the protection of the public very much more difficult than it is." Lord MacDermott, Hamlyn Lectures, 1957, quoted in *Crime and Crown Privilege*, The Criminal Law Review (January 1959), p. 16. For the same reason Attorney General Jackson regarded "the keeping of faith with confidential informants as an indispensable condition of [the F.B.I.'s] future efficiency." 40 Op. Atty. Gen. 45, 46–47 (1941).

The problem is particularly acute in the field of narcotics. It is a matter of common knowledge among enforcement personnel that one who has dealt in narcotics literally risks his life in volunteering to inform on his associates. "Once an informant is known," as Mr. Justice Clark observed in *Roviaro* v. *United States*, *supra*, 353 U.S. at 67 (dissenting),

> the drug traffickers are quick to retaliate. Dead men tell no tales. The old penalty of tongue

removal, once visited upon the informer Larunda, has been found obsolete.

The dimensions of the problem can be discerned from the opinion in *United States* v. *Estep*, 151 F. Supp. 668, 673 (N.D. Tex.), where Chief Judge Davidson took judicial notice of the fact that a number of narcotics informers who had appeared in his court had been murdered or viciously attacked. Twenty-four instances of murder, and one in which the victim was left to die but recovered, were cited. The methods by which the victims met their deaths ran the gamut from shooting to drowning, and included beating, stabbing, and throat-slashing. The government, regrettably, could add a lengthy supplement to the list compiled by the district court—from incidents, known to the Department, from every section of the country.[15] These instances from a single judicial district

[15] In addition, reported decisions involving the murder or foul treatment of informers from an imposing and ever-growing segment of our legal literature. See *e.g. United States* v. *Saunders*, n. 1 (Nos. 15263 and 15264, decided January 3, 1964) (C.A. 6) (narcotics informant, expected to be chief prosecution witness, murdered prior to trial; trial court found that killing had "direct relationship to the prosecution and trial of this case"); *Ferina* v. *United States*, 302 F. 2d 95, 97, 99, 102–103 (C.A. 8), certiorari denied *sub nom. Cardarella* v. *United States*, 371 U.S. 819 (narcotics informant, a grand jury witness, shot in stomach, back, and head by person whom he heard say, "Here's something from Tony"); *United States* v. *Partutian*, 319 F. 2d 661, 663 (C.A. 2), certiorari denied January 6, 1964 (No. 540 Misc.) (narcotics informant "disappeared" after supplying narcotics agent with information leading to fruitful search; agent advised court that in his opinion informant had been murdered); *United States* v. *Bando*, 244 F. 2d 833, 835–836, 837 (C.A. 2), certiorari denied, 355 U.S. 844 (acid-blinding of Victor Riesel,

adequately suggest, however, for present purposes, the gravity of the fear of retaliation.

To be sure, the informant privilege, important as it is, is not without limitations. If, in particular circumstances, giving effect to the privilege collides unavoidably with a social interest of even greater dignity, the privilege must yield. In *Roviaro*, for example, the government's confidential informant was present at, and the sole participant (other than the accused) in, the very crime charged in the indictment (a narcotics offense). He was the only witness in a position to amplify or contradict the testimony of the government's witnesses, one of whom testified that the informant had denied ever having seen the accused. The Court concluded that "*under these circumstances*, the trial court committed prejudicial error in permitting the Government to withhold the identity of its undercover employee * * *" (353 U.S. at 65; em-

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a witness in a grand jury "rackets" investigation, by hireling who was himself subsequently murdered); *Carbo* v. *United States*, 288 F. 2d 686, 687, 689 (C.A. 9), certiorari denied, 365 U.S. 861 (threats against, and physical assault upon, government's principal witness in extortion case; see also *Carbo* v. *United States*, 314 F. 2d 718, 743–744 (C.A. 9), pending on petitions for writs of certiorari *sub nom. Palermo, et al.* v. *United States*, Nos. 122, 134, 141 and 145 (same case on appeal from convictions); and see *Carbo* v. *United States*, 82 S. Ct. 662, 667–669, 7 L. Ed. 2d 769, 775–777, review denied, 369 U.S. 868 (opinion of Mr. Justice Douglas denying bail pending appeal)); *Odom* v. *United States*, 116 F. 2d 996, 998 (C.A. 5), reversed on other grounds, 313 U.S. 544 (beating of, and threat to kill, witness at injunction hearing arising out of labor dispute); *Schuster* v. *City of New York*, 5 N.Y. 2d 75 (1958) (murder of informant who supplied information which led to arrest of the notorious Willie Sutton).

phasis added). "Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause," the Court declared, "the privilege must give way" (353 U.S. at 60–61). But the Court made it clear that the decision was narrowly based, and that no general erosion of the privilege was intended. It stressed that (*id.* at 62)—

> We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.

In short, no hard-and-fast prescription can be laid down as to the necessity for disclosure even where an accused may plausibly insist that he needs the information as an aid to his defense. Still less should there be an automatic rule of disclosure where the information is sought for the purpose of suppressing evidence under authority of a duly issued search warrant.

We maintain, therefore, that the government should in no event be required to betray its confidential sources, and thereby expose them to reprisal, unless the accused has come forward with independent evi-

dence casting substantial doubt upon the integrity of the affidavit. Under a contrary holding almost nothing would be left of the privilege. If the names of informants must be laid bare to every defendant who makes an unsupported allegation of fraud in the procurement of the warrant, persons cooperating with law-enforcement officials would be deprived of all meaningful protection and hence discouraged from giving further assistance. Clearly, we submit, the interest of the public in keeping open the government's channels of information is entitled to greater respect than the defendant's interest in conducting a fishing expedition on the off-chance of turning something up. Accordingly, to justify an exception to the privilege, there must at least be shown a reasonable basis—"probable cause," as it were—for believing that the affidavit contains material misrepresentations. Cf. *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 400 (holding that an accused must show "a particularized need" for grand jury minutes, which "outweighs the policy of secrecy," before he may have access to the minutes for impeachment purposes).

2. The decisions requiring disclosure of informants in the case of a search without warrant are distinguishable

Until now the question of the government's duty to identify its informants has arisen almost exclusively in cases involving searches without a warrant, where the showing of probable cause is founded upon information received from a confidential source. It is well settled that where officers, acting on such information, undertake an investigation of their own

and thereby obtain sufficient firsthand intelligence to constitute probable cause independently of the initiating information, disclosure is not required.[16] On the other hand, where confidential information is the sole basis for the search, or at least an indispensable element of that basis, the decisions are in conflict.[17]

Whatever may be its status in the case of a search without warrant, the government's privilege has a

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[16] *Scher* v. *United States*, 305 U.S. 251, 254; and see, *e.g.*, *Mosco* v. *United States*, 301 F. 2d 180, 189 (C.A. 9), certiorari denied *sub nom. Hansen* v. *United States*, 371 U.S. 842; *Miller* v. *United States*, 273 F. 2d 279, 281 (C.A. 5), certiorari denied, 362 U.S. 928; *Pegram* v. *United States*, 267 F. 2d 781 (C.A. 6); *McQuaid* v. *United States*, 198 F. 2d 987, 990 (C.A. D.C.), certiorari denied, 344 U.S. 929; *Cannon* v. *United States*, 158 F. 2d 952, 954 (C.A. 5), certiorari denied, 330 U.S. 839; *Shore* v. *United States*, 49 F. 2d 519, 522–523 (C.A. D.C.), certiorari denied, 283 U.S. 865; *Segurola* v. *United States*, 16 F. 2d 563, 565 (C.A. 1), affirmed on other grounds, 275 U.S. 106.

[17] Sustaining the privilege: *McInes* v. *United States*, 62 F. 2d 180 (C.A. 9), certiorari denied, 288 U.S. 616; *United States* v. *Li Fat Tong*, 152 F. 2d 650, 652 (C.A. 2); *Nichols* v. *United States*, 176 F. 2d 431, 433 (C.A. 8), affirming *United States* v. *Nichols*, 78 F. Supp. 483, 486–487 (W.D. Ark.). See also *Shore* v. *United States*, 49 F. 2d 519, 522–523 (C.A. D.C.), certiorari denied, 283 U.S. 865 (*dictum*); *Cannon* v. *United States*, 158 F. 2d 952, 954–955 (C.A. 5), certiorari denied, 330 U.S. 839 (*dictum*); *Jones* v. *United States*, 271 F. 2d 494, 495 (C. A. D.C.), certiorari denied, 362 U.S. 944 (demand for disclosure not timely made). And compare this Court's *dictum* in *Scher* v. *United States*, 305 U.S. 251, 254: "Moreover, as often pointed out, public policy forbids disclosure of an informer's identity unless essential to the defense, as, for example, where this turns upon an officer's good faith" (the decision *held* that the officers had personally seen and heard enough to justify the search independently of the confidential information). Requiring disclosure: *Wilson* v. *United States*, 59 F. 2d 390, 392 (C.A. 3); *Costello* v. *United States*, 298 F. 2d 99, 101 (C.A. 9); *United States* v. *Robinson* (No. 28090, decided December 18, 1963) (C.A. 2); *United States* v. *Blich*, 45 F. 2d 627, 629

far stronger claim to recognition where, as here, the search was conducted pursuant to a warrant. The distinction is recognized even by the authorities which most firmly insist upon the necessity for disclosure in the former situation. *United States* v. *Robinson* (No. 28090, decided December 18, 1963) (C.A. 2); *Costello* v. *United States*, 298 F. 2d 99, 102 (C.A. 9). And in a recent decision involving a search pursuant to a warrant, issued on the basis of an affidavit which had heavily relied on information from confidential sources, the Court of Appeals for

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(D. Wyo.); *United States* v. *Keown*, 19 F. Supp. 639, 645–646 (W.D. Ky.).

In *Roviaro* v. *United States*, 353 U.S. 53, 61, this Court remarked that "[m]ost of the federal cases involving this limitation on the scope of the informer's privilege"—*i.e.*, that the privilege must give way where disclosure is essential to fair determination of a cause—"have arisen where the legality of a search without a warrant is in issue and the communications of an informer are claimed to establish probable cause," and the Court added that "In these cases the Government has been required to disclose the identity of the informant unless there was sufficient evidence apart from his confidential communication." As we note in the text, however, the decisions are actually in conflict on the point. We would suggest, moreover, that the *Li Fat Tong* decision, *supra*, which this Court included among the cases cited in support of its above-quoted *dictum*, actually is authority for the opposite view. It is true that the court in that case said that "Any suggestion that the evidence on which probable cause rested was derived wholly from unidentified informers, even if that fact be regarded as critical, is not borne out by the record" (152 F. 2d at 652). But the court went on to acknowledge that the critical information, without which there obviously would have been no probable cause, *viz.*, that the accused was carrying smoking opium, did originate with an unidentified informant (*ibid.*), whose identity the court nevertheless held need not be disclosed.

the District of Columbia Circuit held that divulgence of the identity of the informants was not required. *Walker* v. *United States*, n. 4 (Nos. 17897 and 17898, decided November 14, 1963).[12] See, also, *United States* v. *Whiting*, 311 F. 2d 191, 195–196 (C.A. 4), certiorari denied, 372 U.S. 935 (where, however, the confidential information had been strongly corroborated by the officers' own observations).

The interest of the government in withholding the names of its informants is equally great in either case. But the interest of the defendant in obtaining those names—or rather the danger of official overreaching if the informants are not identified—is much less significant in a case where a search warrant has been obtained. In such a case, the accused is not dependent solely upon the district court for the protection of his Fourth Amendment rights. The magistrate who passes upon the application for the warrant provides an additional and effective bulwark against official irresponsibility. Where resort is had to a warrant, "evidence in the possession of the police

[12] The court stated that it had no occasion to define the precise limits of the privilege in the case before it; remarking that the "exception to" the privilege, there invoked by the accused, had been claimed by the appellants in their brief "in terms of the assumption that the factual evidence of probable cause [in that case] 'consisted *entirely* of the hearsay statements of three unidentified, faceless and nameless informers,'" the court said that it did "not so view the record" (*ibid.*; emphasis in the original). Although the evidence of probable cause relied on by the applicant for the warrant did not, as the court observed, consist entirely of the information from unnamed sources, such information nevertheless formed an indispensable part of the evidence. The case is thus identical with the present case in relevant part.

[is] weighed by an independent judicial officer, whose decision, not that of the police, [governs] whether liberty or privacy is to be invaded." *Jones* v. *United States, supra*, 362 U.S. at 270–271. Equally important, the showing of "probable cause" which an officer makes in an affidavit *prior* to the search is less likely to overstate or embellish the evidence than one which he formulates for the first time in a suppression hearing subsequent to a search without warrant. In the latter case, the search is a *fait accompli* and the officer is under pressure to justify what he has done. Moreover, a successful search without warrant, though it may actually have been inspired by a mere "hunch" or a tip from an unknown informant, may appear in retrospect to have been more soundly based. Thus, having caught the defendant "red-handed", as it turned out, the officer may honestly deceive himself as to the extent of his foreknowledge. In reconstructing his prior information, he may include facts which were brought to light by the search itself, or may claim for his informant a reliability which became evident only after the fact. In sum, hindsight, wishful thinking, and the officer's natural desire for self-vindication may occasionally supply elements of "probable cause" which in reality were missing.

Where a warrant is obtained, these dangers are greatly minimized, if not eliminated. Since the officer must specify in the affidavit the articles he expects to find, he cannot rely upon hindsight to identify the objects of the search. That alone fully protects the accused against that most flagrant of Fourth

Amendment violations—the general exploratory search which has no definite object. Moreover, an agent who submits a sworn affidavit to a magistrate knows that he may be interrogated as to doubtful aspects and called upon to provide further specifics, *e.g.*, the name and credentials of his informant. Such an officer is unlikely to exaggerate or misrepresent the evidence upon which he relies. Not only are the deterrents great, but the incentives are small. The search has not yet become a point of honor to be defended; the "hunch," not yet confirmed by events, has not acquired the appearance of inevitability which retrospection may later give it; and the unknown tipster, his information still unverified, will not command that degree of credence which might tempt an officer to overstate his reliability.

The possibility concededly remains that a search warrant may be procured, and a fruitful search conducted, on the basis of assertions which could be proved false if disclosure were ordered. In terms of this case, it is conceivable that the alleged conversation between Agent Moore and the confidential informant never actually took place, or that the informant had not in fact furnished reliable information to the F.B.I. in the past.[10] We believe, however, that the danger that a responsible executive officer, under the penalties of perjury and disciplinary action, would thus intentionally misinform the magistrate is

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[10] Cf., as to the latter aspect, *United States* v. *Pearce*, 275 F. 2d 318 (C.A. 7). In citing this case, we do not wish to be understood as indicating agreement with the court's assessment of the veracity of the pertinent representation made in the affidavit there involved.

not great enough to justify a blanket exception to the privilege. It is a risk which can safely be taken by a society whose protection owes much to the ability of law-enforcement officers to guarantee the anonymity of their sources.

C. In this case, petitioner made no showing which would cast doubt upon the representations

1. In the present case, petitioner made no showing which would justify a failure to give effect to the privilege. The critical representation in the affidavit—the one which undoubtedly constituted both the necessary and sufficient condition for the issuance of the warrant—was that a previously reliable informant advised the affiant that he had seen 75 to 80 unlabeled fur garments in the Rugendorfs' basement and gave a description of them which corresponded almost precisely with the official description of the furs stolen in Mountain Brook, Alabama, the previous month. Petitioner offered no proof, and indeed made no allegation, which cast the slightest doubt upon the accuracy of the affiant's representation or, for that matter, the truth of the informant's story. If anything, the theory of the defense lends credence to both, for the theory has it that the furs must have been placed in the basement several weeks prior to the search (during the Rugendorfs' vacation) by Leo Rugendorf, a known "fence," who possessed a key to the house. What is more, the affidavit shows on its face that it was not merely the work of an agent with a hunch, but was truly based upon an eyewitness report. For while anyone privy to the F.B.I. files,

perhaps, could have copied the official description of the garments stolen in Alabama, only someone who actually saw the furs in the Rugendorf home would have known (i) that they were to be found in the basement, and (ii) that the labels had been removed. Both of these additional details proved to be accurate (R. 70). Admittedly, the success or failure of a search is immaterial to the question whether "probable cause" existed; a search is not made lawful by virtue of what it turns up. *United States* v. *Di Re*, 332 U.S. 581, 595; *Byars* v. *United States*, 273 U.S. 28, 29. But there is no reason why the condition and characteristics of the items uncovered in a search may not be used to confirm, as they do here, the authenticity of a purported eyewitness description made *prior* to the event.

Petitioner makes much of the fact that the information referred to in the affidavit was later shown to be inaccurate in two particulars. The erroneous statements were (1) that petitioner and his brother Leo were in the meat business together, and (2) that Rugendorf Brothers Meat Market was managed by petitioner (*supra*, pp. 13, 14–15). These inaccuracies, we submit, in no way impugn the integrity or truthfulness of the affidavit. In the first place, neither of the items was presented as a statement of fact within Agent Moore's (the affiant's) own knowledge. Both were communicated to him by Agent McCormick, who (in one instance at least) received the information from another informant. Agent Moore did not, and obviously could not, vouch for the accuracy of his briefing, but merely for the fact that the briefing had taken place. And although

representation, had it been false, defense counsel did not seek his testimony.[20]

Second, both items were, at best, of peripheral relevance to the showing of probable cause. If they had any function in the affidavit, it was to establish an association between Leo Rugendorf, the known "receiver," and Samuel Rugendorf, the owner of the house intended to be searched. Such a connection, however, was scarcely necessary, since the two were intimately linked as brothers. And in any case there was no need to show that petitioner was implicated in the theft or receipt of the furs or even that he knew the furs had been deposited in his home. It was not an arrest warrant which was sought, but a search warrant. Having reasonable cause to believe that stolen property was hidden in petitioner's basement, the F.B.I. would have been under a duty to search the premises and recover the property, even had the owner been manifestly innocent of any crime.

Third, there is no reason to believe that either inaccuracy was anything more than on honest, and quite natural, mistake of fact. Testimony at the suppression hearing established that Leo was a salesman for Rugendorf Brothers Meat Market (R. 20–21), and that petitioner, while no longer associated with that enterprise, had at one time been its owner and was still the owner and operator of his own grocery store at another location (R. 19). Indeed, the very name of the meat market at which Leo worked strongly suggested that he was in business

[20] Although McCormick was temporarily hospitalized and unavailable as a witness (*supra*, p. 17), petitioner could have requested a continuance in order to take his deposition. No

with his brother. In these circumstances, and in light of the trivial and superfluous character of the items in question, it seems inconceivable that the facts were deliberately misrepresented to, much less by, the affiant.

The language of the affidavit is ambiguous as to whether the information that petitioner managed Rugendorf Brothers Meat Market originated with Agent McCormick (who communicated it to the affiant, Agent Moore) or with McCormick's informant, Officer Kelleher of the Chicago police. It states that (R. 7):

> Special Agent W. J. McCormick of the Federal Bureau of Investigation told this affiant that * * * on approximately March 1, 1962, Chicago Police Officer James Kelleher told McCormick that he saw Frank Schweihs [whom another informant named as the person who committed the fur burglary in Alabama] at Ruggendorf Brothers Meat Market, managed by Samuel Ruggendorf, at 2449 South Wentworth Avenue, Chicago, Illinois; * * *

Testifying at the suppression hearing, Kelleher confirmed that he told McCormick about having seen Frank Schweihs at the Rugendorf Brothers Meat Market, but he denied telling McCormick that the Market was managed by petitioner (R. 17). Evidently, therefore, the source of the statement was McCormick. Defense counsel might easily have cleared up the issue by requesting leave to take McCormick's deposition[20a] and by asking McCormick

[20a] See fn. 20, *supra*, p. 47.

whether he in fact told the affiant that the Rugendorf Meat Market was managed by petitioner and, if so, where he obtained that misinformation. Counsel did not avail himself of this opportunity, apparently believing that the matter was not of sufficient moment. Without clarification by McCormick, Kelleher's testimony has little significance.

For these reasons, the district court was entirely justified in minimizing the importance of the two inaccuracies (R. 25).[21] And, in the absence of any reasonable basis for doubting the good faith and veracity of the affidavit, the court properly rejected the demand that the government surrender the names of its confidential informants and denied the motion to suppress.

2. We have shown that the trial court was correct in refusing to compel the identification of the informant who saw the furs in petitioner's basement. By the same token the court properly sustained govern-

[21] As noted, *supra*, p. 18, the district court, in overruling the motion, said, "Even if part of the affidavit should be false, the main part of it, the material part, is true, because they actually found the garments there" (R. 25). While its choice of language was unfortunate, the court, we suggest, did not mean to imply that it believed the affidavit to be untrue, even in part. Considering the relative unimportance of the items of information in the affidavit which were shown to have been erroneous and the improbability (for the reasons we have suggested) that the inaccuracies were the product of intentional misrepresentation by anybody, we believe it likely that the court used the word "false" in the sense of "incorrect." In any event, even if the court meant "deliberately false," it is clear that the court was simply making an assumption *arguendo*.

ment objections to questions which, if answered, might have had that same consequence. The queries put to Agent Moore as to where his conversation with the informant took place, and the exact day on which the latter saw the furs (*supra,* p. 18), were clearly of that character. If, for example, the conversation was held at the informant's residence, place of business, or accustomed haunt, an answer describing the place would indirectly have revealed his identity. Similarly, if the informant was one of a number of prospective buyers of the stolen furs permitted to view them during the week in which the informant allegedly saw them, specification of the exact day of the viewing might have exposed him. As we have seen (*supra,* p. 18, fn. 8), government counsel objected to both questions on the ground that answers might jeopardize the informant's life. And the court, apparently recognizing the dangerous potentialities of the questions, properly excused the witness from answering.

Indeed—still assuming the government's right to protect the identity of the informant—it is difficult to see what legitimate purpose petitioner could have for demanding the collateral information. The most obvious utility of that information was to furnish clues to the identity of the informant—plainly an impermissible object. Petitioner suggests that the question as to the place of the informant's conversation with the agent may have relevance for another purpose—namely, that "if the conversation took place in the defendant's basement, or in the immediate

vicinity of the defendant's home, a strong basis would be generated for the belief that the prosecution evidence was the product of an unlawful search". (Br. 28). The short answer is that, if petitioner wished to explore that remote possibility, he could easily have done so by means of direct questions addressed to that very point and calling, initially at least, for "yes" or "no" answers which would not have threatened to expose who the informant was. The only other conceivable purpose of the question was to test Agent Moore's memory and impeach his credibility. But, as we have indicated, the interest of the public in protecting the government's channels of information overrides the interest of the petitioner in conducting a general fishing expedition.

The same considerations apply to the question as to the date on which the informant viewed the furs in the Rugendorfs' home. Petitioner suggests no way in which that information might have assisted him in attacking the representations contained in the affidavit. On the contrary, the stated purpose of the question was to enable petitioner "to attempt to show that he was not present when the informant saw the furs" (Br. 30), not that the viewing did not occur. And while petitioner suggests the possibility that the informant may have gained access to the house with the connivance of the police and "without the permission or the knowledge of the guilty parties *or* the petitioner" (Br. 30), that fact could not have been established by learning the informant's time of entry, since petitioner could not have known whether

the informant had been let in by the police or by the "guilty parties." In any case, as we have noted, the question whether the police were guilty of trespassing, or encouraging the informant to trespass, was one which could safely have been explored by direct questioning of the officers involved.

III

PETITIONER WAS NOT ENTITLED TO THE NAMES OF THE INFORMANTS FOR PURPOSES OF DEFENDING HIMSELF ON THE MERITS, SINCE HE DID NOT ADEQUATELY RAISE THAT ISSUE IN THE TRIAL COURT

1. Petitioner further urges that, wholly apart from the question of the validity of the warrant—the subject at issue in the suppression proceedings—he was entitled to the name of the informant who saw the furs in order properly to defend himself on the merits at the trial proper (Br. 18–27). In the petition for certiorari this claim was placed on the ground that the informant was in a position to know who stole the furs and who put them in petitioner's basement, and therefore could establish petitioner's guilt or innocence. As we pointed out in our brief in opposition, however, the basic issue at trial was whether petitioner *knew* that stolen furs were concealed in his basement. Even if the confidential informant might have been able to testify as to who stole the furs or how they came to rest in petitioner's basement closet, this would not necessarily have cast light upon the issue of petitioner's knowledge. In other words, this is not a case like *Roviaro, supra,* in which the informant had contrived and played a direct and prominent part

in the very offense for which the accused was convicted. See, to similar effect, *Gilmore* v. *United States*, 256 F. 2d 565, 566–567 (C.A. 5).

In his brief on the merits, petitioner advances a somewhat different argument. He contends that the informant, assuming that he was not a trespasser, could have obtained his information only with the acquiescence of the guilty parties. If it was petitioner who admitted him to the house and showed him the furs, then petitioner is "almost certainly guilty." On the other hand, the argument runs, if the informant was admitted by an unauthorized person during petitioner's temporary absence, then by identifying that person and describing the circumstances of the entry, the informer might establish petitioner's innocence or at least provide a lead to other evidence useful to the defense (Br. 20–21). But even on this latter theory, it remains a matter of conjecture whether the informant could materially illuminate the question of petitioner's knowledge. We have strong doubt, therefore, whether petitioners showing would have met the test of *Roviaro* even had the claim been adequately asserted in the district court.

It is unnecessary, however, to decide that question, for in any event petitioner did not properly raise in the trial court the issue whether he was entitled to disclosure for purposes of his defense on the merits. Still less did he articulate the supporting theory on which he now rests that claim. Petitioner's demands for identification of the confidential informants referred to in the affidavit for the search warrant were not made in the course of the trial on the

merits. Without exception, they were made in connection with the proceedings on the motion to suppress, at a time when the principal focus of inquiry was whether disclosure should be ordered for purposes of determining the validity of the search. In this context, such allusions as there were to the possible utility of the information in connection with defense on the merits were too oblique and indefinite to apprise the court of the nature of petitioner's claim.

The first reference to the matter was the statement of defense counsel, in the pre-trial suppression proceeding, that—

> Roviera [*sic*] *v.* U. S., which is cited by our Seventh Circuit as authority for this proposition, states that if the informants, if the names of the informants are necessary to a proper defense or a proper presentation of the defendant's case in attacking the search warrant, then in the interest of justice it must be given to the defendant. * * * [R. 13, 75; *supra*, p. 14]

In context, that citation of authority appeared, and undoubtedly was intended, to be offered in support of disclosure for purposes of "a proper presentation of the defendant's case in attacking the search warrant," not for purposes of "a proper defense." The only other pertinent comment during the pre-trial hearing was the suggestion of defense counsel (R. 14; *supra*, pp. 15–16) "that not only is this information necessary to the defendant because if he takes the stand it will demonstrate that Sam Rugendorf had nothing to do with it, or possibly his falsity, but I would sug-

gest that perhaps he would be a pretty good witness for the Government, that they ought not to want to hide the witness, that he would pretty much make out a case for the Government." Finally, in the further hearing on the motion to suppress, conducted immediately after the government's case-in-chief, but before the presentation of the defense, counsel declared (R. 24; *supra*, p. 19) that "*United States* v. *Roviera* [*sic*] suggests to the Court that we are entitled to some information about this so-called confidential informant, and even if the Court denies my motion that we be given his name, denies the motion about where the conversation took place, can we at least not have the date on when it took place [*sic* [22]] so Sam Rugendorf can defend himself?"

These intimations were as close as petitioner came to placing his demand for disclosure of the informants on grounds related to the defense on the merits. Never did counsel attempt to spell out in what way the testimony of the informants would be useful in establishing petitioner's innocence. Still less did he articulate the specific theory of relevance now urged in his brief. And at no point in the trial of the *merits* did counsel renew the request for disclosure even in its generalized form.

Indeed, there is reason to believe that the theory now advanced did not even occur to defense counsel until long after the trial was over. Petitioner's opening brief in the court of appeals was silent on the

[22] Counsel meant the date on which the informant saw the furs. The date of the agent's conversation with the informant (March 16, 1962) was stated in the affidavit.

need for disclosure for purposes of defense on the merits. The matter of disclosure was discussed solely in terms of the Fourth Amendment issue raised by the motion to suppress. The first hint that the testimony of the informant may also have been relevant to the merits was a suggestion, appearing at the end of petitioner's *reply brief*, that only the informant could testify as to whether he had "participated with persons other than the defendant in placing the furs in defendant's basement," and that it was thus "vital to the defendant to obtain the name of the informant both for use in the hearing on the petition to suppress the evidence and for use in his defense in the trial" (p. 8).[22]

In sum, the issue now raised—whether exposure of the informants was required in order to assist petitioner in the preparation of his defense—was not presented with adequate clarity and specificity at the trial stage. Accordingly, it is not properly before this Court.

2. Petitioner also argues that he needed to know the exact date on which the informant saw the furs

---

[22] This argument was subsequently elaborated in the *petition for rehearing* in the court of appeals, where petitioner said: "Certainly, it was material to the theory of the defense to have the jury learn how, with whom, and by what means the so-called informant came to be in the basement of the defendant" (p. 8). (There are indications in the petition for rehearing that the question of how adequately if at all the contention that disclosure was necessary to the defense on the merits was raised at the trial stage was discussed at the oral argument in the court of appeals (pp. 6, 9). The court's conclusion in this regard is perhaps indicated by the fact that its opinion is wholly silent on the present issue.)

in his basement (the affidavit merely disclosed that the event occurred sometime during the week preceding March 16, 1962) in order to prepare his defense, and that the trial court erred in not requiring the government to provide that information (Br. 29–30).[24] In support of that demand, it is urged that if the informant saw the furs at a time when petitioner and his wife were elsewhere, a clear inference would arise that "an unauthorized copy of the petitioner's house key was in the hands of the guilty parties," and that "the thieves were interested in keeping petitioner from learning of the presence of the furs" (Br. 29).

This information, too, was requested by defense counsel solely in connection with the suppression proceedings. On the other hand, the request for the date on which the informant saw the furs was explicitly based upon the importance of the information to the defense on the merits, and, unlike the demand for the *identity* of the informant, was accompanied by an explanation, albeit somewhat generalized, as to the

[24] Petitioner also argues that it was error for the court not to require the government to disclose the place at which the informant's conversation with the agent took place (Br. 28–29). We do not understand him to argue, however, that this information was needed by him in connection with the merits of the defense—as distinguished from its claimed relevance to the suppression issues. No such argument was, in any case, made in the district court, and we do not, even now, see on what theory this information might have been helpful to the defense. See *supra*, pp. 49–51, for our argument as to why, on the suppression issues, this information was rightly withheld if it was proper to withhold the basic information of the informant's identity.

manner in which it would be relevant to the defense (R. 23; *supra*, p. 19). But even if it be conceded that the issue as to the disclosure of this collateral information was properly presented at the trial, the request, nonetheless, was correctly denied. For, as to *this* information, the petitioner cannot meet the test of *Roviaro;* he cannot show that knowledge of the exact date on which the informant gained access to his house would be materially helpful to his defense.

Petitioner testified at the trial that, with the exception of Sundays (when he came home at about 3:00 p.m.), he was away from the house all day every day between March 4 and March 22 (which included the one-week period during which the informant saw the furs), and at home only at night (R. 40). Mrs. Rugendorf testified that, except for Sundays (when she was home all day), she was away from the house three or four hours nearly every day between March 4 and March 18 (which similarly included the relevant one-week period) (R. 32). It is difficult to see, therefore, how disclosure of the precise day on which the informant claimed to have seen the furs could significantly have assisted the defense—even on the theory now advanced in this Court.

IV

THE EVIDENCE IS SUFFICIENT TO SUPPORT THE CONVICTION

As to petitioner's final contention (Br. 40–44)—that the evidence is insufficient to support the conviction—little need be said. The undisputed evidence showed that 81 fur garments, all admittedly stolen, were found in a basement closet of the single-family dwelling in which petitioner and his wife resided. The closet was

one of several that opened off a neatly furnished recreation room showing every evidence of regular use by the occupants. In the same closet with the stolen garments was a fur piece which Mrs. Rugendorf acknowledged to the agents was her own property (*supra*, pp. 3–4). The defense at trial was that these furs were placed in the closet unbeknownst to petitioner while he and his wife were on vacation (from February 17 to March 4); that they had no occasion to look into the closet during the two and one-half weeks which intervened between their return home and the F.B.I.'s discovery of the furs; and that the guilty party must almost certainly have been petitioner's brother, Leo, a known receiver of stolen goods who had borrowed the key to the house just prior to petitioner's vacation and never returned it (*supra*, pp. 5–7).

Where a defendant is found in possession of stolen property a short time after the theft, and comes forward with no satisfactory explanation, it is well settled that the jury may infer the element of guilty knowledge. *Wilson* v. *United States*, 162 U.S. 613, 619. Here the jury was plainly entitled to reject the proffered explanation—an explanation which required it to believe that a thief or receiver would deposit a large number of "hot" furs in the closet of a regularly used basement recreation room in the home of a completely innocent and unknowing third person, *i.e.*, a person who could be expected to call the police the moment he chanced upon the loot.

Moreover, wholly apart from the inherent implausibility of this account, the jury had ample grounds for

disbelieving the testimony of petitioner and his wife. For one thing, whereas petitioner testified that Leo had never returned the house key which petitioner entrusted to him immediately prior to his vacation, Agent Lee, one of the arresting officers, testified that petitioner told him that Leo *had* returned the key—two and one-half weeks previously, shortly after petitioner's return (*supra*, pp. 6, 7). If Lee's testimony was credited, petitioner plainly stood impeached on a key point in his story. In addition, both petitioner and Mrs. Rugendorf gave testimony on various aspects of the related events which sharply conflicted with the rebuttal testimony of the government officer-witnesses (*supra*, pp. 7–11). If, as the verdict indicates, the jury believed the prosecution witnesses, they must have concluded that the defense witnesses were lying about numerous aspects of the events in question. And, if satisfied that they were fabricating as to details, the jury could rationally conclude that the central point of their stories—that they were unaware of the presence of the furs in their home—was likewise false.

In *Dyer* v. *MacDougall*, 201 F. 2d 265, 269 (C.A. 2), quoted with approval in *National Labor Relations Board* v. *Walton Mfg. Co.*, 369 U.S. 404, 408, the court of appeals declared that—

> [S]uch evidence [a witness's demeanor] may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such

hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies.

Here the jury had much more than the defense witnesses' demeanor to go by; they had evidence of repeated and deliberate misrepresentations.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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JANUARY 1964.

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APPENDIX

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 2315 of Title 18 of the United States Code provides in pertinent part:

> Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of $500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken; * * *
>
> * * * * * *
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.
>
> * * * * * *

Rule 41 of the Federal Rules of Criminal Procedure provides in pertinent part:

> RULE 41. SEARCH AND SEIZURE
>
> (a) *Authority to Issue Warrant.* A search warrant authorized by this rule may be issued by a judge of the United States or of a state, commonwealth or territorial court of record or by a United States commissioner within the district wherein the property sought is located.

(b) *Grounds for Issuance.* A warrant may be issued under this rule to search for and seize any property.

(1) Stolen or embezzled in violation of the laws of the United States; or

* * * * *

(c) *Issuance and Contents.* A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. * * *

* * * * *

(e) *Motion for Return of Property and to Suppress Evidence.* A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that * * * (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued * * * * * *

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No. 223

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

SAMUEL JOSEPH RUGENDORF,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certriorari to the United States Court of Appeals for the Seventh Circuit

Reply Brief For Petitioner

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Reply Brief for Petitioner

May it Please the Court:

In view of the nature of the respondent's presentation, we deem it appropriate that recurrence be had to the issues between the parties and to the history of the development of those issues.

Petitioner's home was searched on the authority of a warrant issued pursuant to an affidavit filed before the United States Commissioner.

In the trial court, the petitioner challenged the legal sufficiency of the warrant and further moved to suppress the fruits of the search on the grounds that the application for the search warrant was untruthful. (R. 2)

Petitioner proved two of the averments of the affidavit to be untruthful. One of the averments proven to be untruthful, was the supposed statement of an unnamed confidential informant. (R. 19-21; *Cf.* R. 7)

The other averment proven false, purported to come from a *named* informant. (*Cf.* R. 7) However, the named informant took the witness stand and swore that he had never given such information as that attributed to him within the affidavit supporting the application for search warrant (R. 17).

The motion to suppress, although filed in advance of trial, was heard when the presentation of the government's evidence had almost concluded (R. 17), and involved the presentation of evidence by the defendant. It was directly interwoven with the trial itself, although this evidence was not heard by the jury.

At that point, the defendant renewed a request which he had made unsuccessfully in advance of trial, for disclosure of the identity of the alleged confidential informants referred to in the affidavit. The defendant made it clear that this information was needed by him in support of his motion to suppress (R. 13).

The defendant made it equally clear, not once but several times, that this information was needed to assist him in his defense on the merits (R. 13, 14, 23, 24).

The government never contended at the trial that the information was irrelevant, or that it was sought in an improper manner, or that it was sought in the wrong kind

of proceeding, or that it was sought for the wrong purpose, or that it was sought at the wrong stage of the trial.

The government stated only that disclosure of the information "might . . . probably" (R. 22) cause a "possible murder" (R. 22).

The government assigned no other grounds for withholding the information.

None whatever.

Obviously impressed by the government's suggestion that a life was at stake (a suggestion which the defendant would heartily have seconded in its application to himself), the court expressly foreclosed the defendant from further inquiry into the matter (R. 24). The court further stated that since the affidavit said that there were furs in the basement, and in fact furs were found in the basement, the significant portion of the affidavit was truthful, so that it did not matter whether the balance of the affidavit were false or not (R. 25).

From the resulting conviction, the defendant appealed. In his brief, he addressed himself to the issues delineated at the trial. The government answered, stating that the doctrine of *Roviaro* ". . . . is applicable only when the disclosure is relevant and helpful to the *actual defense* of the accused," (Gov't. Br. in Court of Appeals, p. 17; emphasis copied) and that disclosure was inappropriate in a search warrant proceeding (*Ibid.*, pp. 16-17). The government also argued that *Rovario* was "applicable only when the informer 'helped set up the commission of the crime and was present at its occurrence,' " (*Ibid.*, p. 13).

In his reply brief in the Court of Appeals, the defendant attempted to meet the new issues thus raised. An opinion was duly rendered, holding that disclosure of an identity

of an informant could not be compelled in a proceeding to suppress the product of a search warrant, and further holding that *Roviaro* applied only where the informant was present at the crime and helped set up its commission (R. 69-74).

Defendant then petitioned for a writ of certiorari, citing all of the contentions theretofore advanced in opposition to his request for disclosure of the identity of the informant. In opposition, the government argued, essentially, that the opinion of the Court of Appeals was proper; that such disclosure is appropriate only "where it is essential to the individual's right to prepare his defense" (Br. in Opposition, p. 9); that the trial court's rulings were "overly cautious", but justifiable as a matter of discretion (*Ibid.*, p. 11); and that defendant was not entitled to aid his defense on the merits because the informer had not contrived and "played a direct and prominent part in the very offense for which the accused was convicted". (*Ibid.*, p. 12)

Certiorari was granted, and the defendant submitted briefs to your Honors on the merits of his case. He has discussed all of the grounds previously assigned in support of the denial of the information sought by him.

The government has now filed its brief on the merits. In that brief, the government:

A. Abandons its earlier contention that disclosure is appropriate only where the informant is first proven to have been a moving party in the offense.

B. Abandons the contention that disclosure cannot be compelled in any proceeding seeking to suppress the fruits of a search warrant, and states instead that one seeking such disclosure "must show that there is reason for apprehending that a fraud has in fact been committed upon the magistrate." (Gov't. Br. p. 33).

C. Suggests that no fraud was committed upon the magistrate because the application to the magistrate was made by policeman A, repeating what he had been told by policeman B. So long as B was accurately quoted, the government argues, then policeman A was not lying, and policeman B was not there, so that in effect no lie was told. (Gov't. Br. p. 46).

D. As to petitioner's contention that the information was necessary to his defense on the merits, the government argues that if this claim had been properly made in the trial court, "it might well have justified disclosure under *Roviaro*." (Gov't. Br. p. 23). The government then discusses the point, concluding: "We have strong doubt, therefore, whether petitioner's showing would have met the test of *Roviaro*." (Govt. Br. 53).

Besides, the government states, the defendant has been inconsistent in his position.

• • •

A complete reply to the government's painstaking and intensive discussion, would impart to this brief a length inconsistent with the status of this case upon this Court's Summary Calendar. With the indulgence of the court, we will address ourselves briefly to the essential thrust of the points presently urged by the government.

I.

THE EFFECT OF HEARSAY RECITATIONS UPON THE VALIDITY OF AN AFFIDAVIT SUPPORTING AN APPLICATION FOR A SEARCH WARRANT.

We are fearful that the government has misapprehended our complaint with reference to the legal sufficiency of the search warrant.

It is not our "contention that the affidavit in the instant case was legally inadequate because founded on hearsay." (Gov't. Br. 25).

Rather, it is our complaint that the application was legally insufficient because founded on *uncorroborated* hearsay.

We agree with the government that *Jones* v. *United States*, 362 U.S. 257 is dispositive of the issue whether a search warrant is invalidated by hearsay recitations within the application.

But we also agree strongly with the qualification expressed in *Jones* that such hearsay presentation is sufficient only when "a *substantial* basis for crediting the hearsay is presented." (362 U.S. 269, emphasis added.)

In the Court of Appeals, the government argued:

> "In the instant case, the 'substantial basis' is exactly the same as that approved in *Draper* v. *United States*, 358 U.S. 307 and *Jones* v. *United States*, 362 U.S. 257, *i.e.*, an informant who had proven to be reliable in the past." (Gov't. Br. in Court of Appeals, p. 10.)

It is patent from the government's affidavit (R. 6-8) that at the outset, the government relied for corroboration of the alleged informant's story, principally upon an alleged relationship between petitioner and his brother, Leo, in the meat business, and upon the agent's sworn statement, falsely attributed to a policeman, that petitioner managed a business at which the fur thieves had been seen. In fact, that was falsity to the second power. It was false not merely in the aspect of what the informant had said, but in the aspect of what the agent had represented the informant to have said.

pparently, between trial and appeal, the government
ired an appreciation of the indelicacy implicit in
ting to the proven falsehood of its own officer as
bstantial corroboration" of an unnamed informant.

he government now claims that the informant's story
corroborated by the fact that the description of the
given by the supposed informant, matched those of
e only reported burglary involving furs similar to those
ribed by the informant." (Gov't. Br. 26). This seems
s something of a logical circle lacking either entrance
xit. The Mountain Brook furs were selected as those
t closely matching the informant's very loose descrip-
(R. 8), and that description was then deemed reliable
use it was not inconsistent with the equally generalized
icial" description of the Mountain Brook furs (R. 7).
agent affiant, in fact, swore that the Mountain Brook
t was the only one in the past six months whose loot
ched the informant's description; but in fact, more
a quarter of the furs had been stolen during that
od in Shreveport, Louisiana, according to the govern-
t's subsequent evidence (R. 15).

e believe that the government's present reliance on
description of the furs as corroboration of the alleged
rmant's story is completely misplaced. It is obvious
the frequency of theft is such, that it will almost
ys be possible roughly to match a loose description
quantity of merchandise with a description of some-
g which has been stolen somewhere. But this is far
"substantial corroboration." In view of the dem-
rated falsity of those representations within the af-
it most strongly relied upon for corroboration, the
osed coincidence between the informant's description
the Mountain Brook furs, is even less important as
oboration than would otherwise be the case.

The foregoing presentation is only one demonstration of the government's apparent willingness to change the theory of its case, with each shift of the winds of evidence and argument. We believe that an unfortunate frequency of such abrupt reversals of direction, are cited within this Reply.

II.

THE AVAILABILITY OF THE IDENTITY OF INFORMANTS FOR THE PURPOSE OF SUPPRESSING THE PRODUCT OF A SEARCH WARRANT.

The government now appears substantially to have abandoned its earlier contention that the identity of confidential informants can *never* be compelled in any proceeding seeking to invalidate a search warrant. (Gov't. Brief in Court of Appeals, p. 17; Brief in opposition to certiorari, p. 9; and see Opinion of Court of Appeals, R. 73-74.)

Within its present brief (pp. 29-52), the government takes quite a different tack, stating:

> "It is our basic position that one who demands disclosure of the government's confidential sources in order to show that a search warrant was obtained by misrepresentation must show that there is reason for apprehending that a fraud has in fact been committed upon the magistrate." (Gov't. Br. 33).

The government does not suggest the method by which reason for such apprehension is to be demonstrated. If the agent submits an affidavit alleging that his information derives from a confidential informant, a defendant will have no way of showing that the information, in fact, came from wire tap, or illegal trespass and search, or any other unlawful means. He is precluded from showing that the informant does not exist, because obviously he cannot begin to make such proof without testimony from

the agents. The self-evident truth of this proposition serves to demonstrate that what the government is really asking, is that the judicial function not be performed in such cases, and that reliance be placed solely upon the integrity of the police.

Stated another way, the government asks to be relieved of such embarrassing showings as that made in *United States* v. *Pearce*, 275 F.2d 318 (7 Cir. 1960), wherein the confidential informant of "past proven reliability" turned out to be a man who had never given information before and who did not give it that time. The government seeks refuge behind the guaranteed anonymity of the supposed confidential informant, in the teeth of common knowledge that that term is "a frequent euphemism for a wire tapper." *United States* v. *Coplon*, 185 F.2d 629, 639, 2 Cir. 1950.

The government goes to considerable lengths, unnecessarily to justify the informant privilege.[1] No attack is made upon the privilege as such. The only attack made, is upon the government's contention that it can withhold information useful to the defense of a prosecution commenced by it, and that it can obtain a search warrant through a supposed informant without ever showing that the informant truly existed.

At pages 36 and 37 of its brief, the government cites seven cases involving attacks on an informant, and cites

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[1] In the belief that it may aid the Court in evaluating an opus heavily relied on by the government (Br. 29, 30, 34, 35) we point out that Messrs. Harney and Cross, authors of "The Informer in Law Enforcement", are Illinois state narcotics agents who also authored a guide book for narcotics policemen.

another case wherein a trial judge took judicial notice of the likelihood of retaliation upon an informant in view of past incidents of that type.

But this presentation, dramatic though it may be, completely begs the issue. If the government wishes to withhold the identity of an informant, there is no power on earth which can compel disclosure. The only requirement imposed on the government, is that it not seek to forfeit the life or liberty of one of its citizens while withholding material information.

The ultimate truths of the case at bar, are:

1. This is *not* an attempt to sue an informant for slander, or idly to inquire as to the identity of petitioner's detractors, or to rummage through police files for the purpose of impeding an investigation. Cf. *In re Quarles and Butler*, 158 U.S. 532, 535-536.

2. If petitioner were truly guilty, or if the government had really believed that its informant was in danger, the most pedestrian of normal investigative procedures would have resolved both problems. Such tactics as routine surveillance of petitioner's home would have produced strong evidence, probably against others involved in the case as well as petitioner, in a short time. And the case thus built *would not* have depended upon the informer for its essential facts.

3. It was the government, and not the petitioner, who chose to expose to the searchlight of litigation, the supposed fact of the informer's existence. It was the government, and not the petitioner, who chose to proceed in a manner which made the informant the crux of the case.

The government can protect its informants where necessary by respecting their confidences, and by using in-

formation obtained from them as a basis for further investigation. But the government can protect neither its informants nor the rest of its citizenry by basing criminal prosecutions on an informer's story while taking refuge as to his identity and other pertinent facts relevant to a determination of the defendant's guilt or innocence.

It is always possible that an informant may be exposed to retaliation—social, economic, and even physical—if his identity be disclosed. But from that fact, it simply does not follow that a defendant may not inquire whether his right to be secure against an unreasonable search or seizure, has been violated.

Nor does it follow, that a defendant may be imprisoned on the basis of conjecture as to what an informant might have said had he been required to testify.

Much less, does it follow that the informant privilege is a government sanctuary which relieves agents from the necessity of a thorough and reasonable investigation. In the case at bar, normal investigative techniques would have sufficed to settle the issue of defendant's guilt or innocence. The government, for some reason, preferred to rely entirely on its informer.

One thing is certain: Defendant's basement was not intended by the thieves as the ultimate respository of the furs. The furs would have been moved, as quickly as a disposition could have been arranged. A relatively unimaginative surveillance would have done much to settle the issue of defendant's complicity and would also have resulted in the apprehension of the guilty parties when the furs were moved. Even assuming petitioner's guilt, the government claims that others were involved (R. 6-8),

and it is surprising that the agents were willing to proceed *only* against petitioner.[2]

Even a simple anonymous telephone call to this petitioner by an agent, representing himself as a "friend" and warning petitioners to get rid of the furs in his basement, would have yielded substantial and persuasive evidence either for the government or for the defense.

But the agents knew a good thing when they saw it. They were in possession of information which the defendant could not possibly contradict. The more innocent he was, the less likely that he could even explain the evidence. The informant privilege was used not as a shield, but as a sword.

Within *six days* of the time of the alleged disclosure by the informant, a search warrant was obtained and executed. No other investigative technique was even attempted, so far as the record shows.

For after all, what investigative technique could possibly compare with reliance upon the confidential informant? Anything further that might be done, might demonstrate innocence. At the very least, it would give the defendant an opportunity to confront and to cross examine an accuser. How much better, to stop while one is winning, and to present to a defendant only a faceless, nameless, amorphous accuser who can neither be impeached, cross-examined, nor shown to have proceeded unlawfully in the obtaining of his information.

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[2] Petitioner had a spotless record and good reputation (R. 25-30). The others were three "accomplished burglars" (R. 8) and a "fence" (R. 7), according to the agent. It would be imagined that ordinarily the federal police would be anxious to convict those professional criminals.

The confidential informant is the very devil of a fellow.

* * *

The government contends that society really has nothing to fear from the confidential informant, since his activities are closely scrutinized by the very police whose duty it is to protect the Constitution on behalf of all of us.

The arguments made by the government in support of this proposition, are interesting to a lawyer, and will be doubly so to historians yet unborn.

First, the government argues that where a search warrant has been obtained, the officer is required to go on record in advance of the search as to what he expects to find, so that the search could not be justified retroactively (Gov't. Br. 40-44). The government contends that the policeman will then either find the specified property, or he will not, so he is unlikely, in the government's view, to "overstate [the] reliability" of his "unknown tipster." (Gov't. Br. 44). That, we submit, is a flagrant non-sequitur. With at least equal cogency, it can be argued: Either the goods sought by the officer will be found through the search warrant, or they will not. If they are not found, the matter is closed, and the courts will have no occasion to call upon the officer to justify his conduct. If, on the other hand, the goods are found, the reliability of the informant is thereby established, and the officer is not called upon by the courts to justify his conduct. Thus, an officer has nothing to lose by acting on the wildest of tips. The information he receives may be good or bad; but that is of no real concern to him. Whether his informant speaks false or true, the policeman will not be questioned further.

And what of the situation in which the police are faced with the choice between suffering an acquittal because the information has been obtained unlawfully (*e.g.* by illegal

trespass and search or by wiretap), or obtaining a conviction by falsely claiming that the information was received from a "confidential informant"?

The government states that such a possibility may be discounted because no policeman would do such a thing "under the penalties of perjury and disciplinary action." Yet, within the same paragraph, the government cites *United States* v. *Pearce*, 275 F.2d 318, 7 Cir. 1960, wherein an agent, one Stoelting, was shown flagrantly to have falsified, within his search warrant application, his sworn averments relative to a supposed confidential informant. The government's assurance (Br. 44, 45) would be more convincing if the government were to show what penalties were invoked against Agent Stoelting in consequence of his activities in the *Pearce* case. Not without considerable confidence, we offer at this late stage to withdraw this aspect of our argument, if the government will file an affidavit showing that any "penalties of perjury and disciplinary action" were imposed upon Stoelting by way of deterring a repetition of such misdeeds by Agent Stoelting himself or by other agents.[3]

But, the government solemnly assures us, it is so unlikely that any agent would do what Stoelting was proven to have done, that such exposure is "a risk which can safely be taken by . . . society" (Br. 45). We reply that what society is actually risking here, is the effective end of the viability of the protection granted by the Fourth Amendment. Unlike the writer of the government's brief,

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[3] The *Pearce* opinion shows that Stoelting's superior, under whose direction the affidavit was presumably prepared and to whom it anonymously referred, knew that there was no "confidential . . . source which in the past has proved reliable." 275 F.2d 322.

we have no way of predicting the likelihood that any future agent will attempt to do what Stoelting did, while working with his superiors, in the *Pearce* case. We can predict with reasonable certainty, only that if the government's position be sustained, and if such attempts are made in the future, they could not possibly be detected.

• • •

The government's final argument on this point, is that the petitioner made no showing which would cast doubt upon the representations made within the government's affidavits.

That is a very revealing argument. At an earlier point in its brief, the government contended that disclosure should be required in a search warrant proceeding only where "there is reason for apprehending that a fraud has in fact been committed upon the magistrate" (Br. 33). It is, therefore, of interest to see what might constitute such reasonable apprehension of fraud in the view of the government.

The government points out that "the truth of the informant's story" was not disproven (Br. 45). This is a startling assertion, when one considers that the informant's story was never disclosed, except for the ultimate allegation that there were furs in the defendant's basement.

We do not believe that the record will support the government's optimistic assertion that the informant "gave a description of (the furs) which corresponded almost precisely with the official description of the furs stolen in Mountain Brook, Alabama the previous month." (Br. 45). In fact, all that could possibly be said is that the informant's loose description was not inconsistent with the "official" and highly generalized description of the loot from Mountain Brook (R. 7).

In an improbable context, the government argues that only someone who had seen the furs in the Rugendorf home would have known certain things ultimately to be true. Perhaps. But any wiretapper, or trespasser might with equal probability have "known" the facts and any recipient of an anonymous tip could have *believed* such facts. The government here (Br. 46) confirms our apprehension, previously expressed, that attempts may be made to establish the reliability of an informant by the fact that his prediction is ultimately confirmed.

The government states it differently:

> "There is no reason why the items uncovered in a search may not be used to confirm, as they do here, the authenticity of a purported eye witness's description made prior to the event."

Not at all. Such findings do not confirm the *authenticity* of the informer's story; they merely confirm its truth, in one limited aspect. But the authenticity of the story, and the very existence of the informer, remain conjectural in such circumstance.

The logical conclusion from the government's argument, is that it is never necessary to attempt to corroborate the story of an informant. If the informant is right, he is "corroborated" by the findings made pursuant to a search warrant. If he is wrong, the issue is never exposed to the alembic of judicial scrutiny. Therefore, corroboration of an informant is necessarily a total waste of time which might be better spent in the recruiting of new informants.

In support of that argument, the government states that the affidavit was proven to be inaccurate only in two

"minor" particulars. Numbered by the government (presumably in order of inconsequentiality), they are:

1. That petitioner and Leo were in business together; and

2. That the Rugendorf Bros. Market was managed by petitioner (Br. 46).

The government omits reference to a third proven falisity. We will supply it:

3. That officer Kelleher told Agent McCormick that petitioner managed the Rugendorf Bros. Market. (R. 17; *Cf.* R. 7)

If that proven falsity has no other significance—and it clearly does—it is at least a very serious reflection upon the ability of the agents, by relayed hearsay, accurately to report the substance of information received from an informant, even where that informant clearly exists.

Three proven material falsehoods within the affidavit seeking a search warrant do not apparently satisfy the government's artificial standard of "reason for apprehending fraud" (Br. 33), because the items were "of peripheral relevance" (Br. 47). To that contention, two replies are appropriate. First, all matters deemed by the government to be of *central* relevance proceed from an unidentified informer. The defendant has shown to be false, almost everything within the affidavit whose falsity might reasonably have been established. How much further could he possibly have gone? Rhetoric will not obscure the fact that the requirement which the government seeks to impose as a condition of the disclosure of an informant, is actually that the defendant must somehow show that the informant does not exist before the government will consent to tell him who the informant is.

Secondly, the relevance was not "peripheral". The allegations proven false, were the vital "substantial basis for crediting the hearsay" required by *Jones*, 362 U.S. 269.

The government urges that the whole thing was unnecessary in any event since petitioner and Leo were "intimately linked as brothers" (Br. 47).

No. They were not "intimately linked", except by false statements in the Agent's affidavit. They were merely brothers, as were Cain and Abel, Jacob and Esau, Richard and John of England, and innumerable other instances of such "intimate" linkage. Probably for the first time, it has been urged to your Honors that common parentage constitutes a "connection" (Br. 47) which bridges the gap between respectability and opprobrium.

The government contends that petitioner's guilt was not in issue when the affidavit was filed. (Br. 47) But surely, the probability that the furs were in petitioner's home was then in issue, and this issue was presented to the magistrate by assertions which were subsequently proven to be flat untruths.

Taking a different tack, the government contends that it was only "an honest, and quite natural, mistake of fact" (Br. 47) because petitioner had *ten years* earlier been associated with the meat market. To this, the short answer is that the affidavit did not say that petitioner had been associated with Rugendorf Bros. Market ten years earlier. Such an assertion would have been absurd and legally meaningless. The government wanted a meaningful assertion. It got one.

The government contends that a portion of the affidavit proved false is "ambiguous" (Br. 48 and 49). If there is an ambiguity, it relates only to whether agent McCormick

lied about what officer Kelleher had told him, or whether on the other hand, McCormick lied about the petitioner's employment. The "ambiguity" is just as shallow as that. The government states that the issue could have been resolved if the petitioner had taken McCormick's deposition. By that suggestion, the government appears actually to be urging that it might have been possible to prove that the affiant, agent Moore, had falsely reported what McCormick told him. Thus, the government would burden the defendant with the necessity of proving which of the agents had lied, as a condition of granting the defendant relief from those falsehoods.

We regard the government's argument as totally lacking in persuasiveness; but we regard the suggestion relative to McCormick's deposition as utterly fantastic. The day before the trial, the prosecutor advised defense counsel that McCormick "is in a hospital having an operation." (R. 18). Petitioner made it clear that he desired to examine McCormick, (R. 18) but any attempt so to do would have been fruitless indeed. Keenly aware of our responsibilities, we state to your Honors that there is not, and could not be, any suggestion within the record that McCormick would have been, within the limitations of medical feasibility, available at any time for any such deposition or for anything else.

More to the point, very shortly after the cited colloquy, the trial court foreclosed further questioning of the agent affiant (R. 24). We are unable to imagine the basis on which the government feels free to argue that a request to take McCormick's deposition would have been appropriate. The court made it very clear that the truth or falsity of McCormick's assertions, and the reason for such falsity, were totally beside the point (R. 25), and that the issue was closed (R. 24).

The government concludes that the trial court was correct "in minimizing the importance of the two inaccuracies" (Br. 49). With equal force, any conceivable "reason for apprehending a fraud" (Br. 33) must necessarily be susceptible of being similarly minimized, since it cannot possibly go to the ultimate question whether an informant truly exists and, if so, what he is alleged to have said.

As to the collateral information sought by the defendant —the place of the conversation with the supposed informant, and the day of the informer's observation of the furs— the government seems to gain confidence with each new brief. These actions, which were termed "overly cautious" in the government's brief in opposition (p. 11), are now regarded as "proper" in view of "the dangerous potentialities of the questions" (Br. 50).

Any question, we suppose, has dangerous potentialities, although the word "dangerous" may not have the same connotation to an accused as to a policeman. The suggestions of potential danger cited by the government, thin out almost to the vanishing point. There is no possible inquiry which could not be shown to be at least as "dangerous" as those actually propounded.

The government suggests (Br. 51) that express areas of interest could have been explored. The government does not, however, suggest how this might have been done. The questions successfully objected to, were the last questions that the court permitted to be asked of the witness (R. 23, 24). And the foreclosure was effective, not only as to that witness, but as to the very subject matter (R. 25).

• • •

We believe and submit that the Fourth Amendment guarantees will lose all practical effectiveness and enforceability, unless disclosure of supposed confidential sources is required in *all* criminal cases dependent upon a search warrant obtained by disclosures relayed from such informants.

It is not necessary to adopt that rule in order to grant relief to the petitioner here. Petitioner has made a clear showing of presumptive fraud in the affidavit. But this is entirely fortuitous. A policeman can avoid such occurrences in the future, by the simple expedient of limiting his "corroboration" to matters of which the defendant has no knowledge. An example is the concept of one unknown informant "corroborating" another, as the government here suggests. (Br. 29, fn. 10.)

Certainly, at the very least, *any* defendant in such a case is entitled to more than was granted to petitioner in the court below. An *in camera* examination of the supposed informer by the trial court, for example, might have been of some help without presenting any possibility of exposing the informant unnecessarily. A defendant, of course, is entitled to advocacy, and not merely to judgment. Such procedure would grant only an imperfect protection of his rights. But it would be *some* protection. Petitioner had none at all.

III.

THE AVAILABILITY OF INFORMATION RELATING TO AN INFORMANT, FOR DEFENSE ON THE MERITS.

At page 51 of its brief, while attempting to show that the petitioner was not entitled to information in support of his attempt to quash the search warrant, the government argues that certain inquiries by the defendant were

actually designed to enable the defendant to defend himself on the merits of the case, and, therefore, had nothing to do with the search warrant.

At page 52, the government argues that the defendant was not entitled to the information in order to defend himself on the merits, since he did not raise that issue in the trial court.

Fortunately, pages 51 and 52 do not confront each other in American bookbinding. They are, appropriately, back-to-back.

If further comment is necessary, we would state that in the trial court, the defendant forcibly, on numerous occasions, stated clearly that information relative to the identity of the informant was sought by him not merely in order to suppress the evidence, but also to further his defense on the merits (R. 13, 14, 23, 24, 75).

The government argues that the requested information "would not necessarily" have been persuasive on the issue of petitioner's guilt or innocence. This is indeed a novel test of the availability of evidence to a defendant. It is clear that the evidence would have been relevant; but since the defendant was denied access to it, it can always be contended that the evidence would "not necessarily" have been persuasive, so that the defendant was properly denied such access.

Such legal levitation provides a platform from which the government reaches the ultimate plateau of contending that the informant played no part in the offense (Br. 52, 53). It is comforting to have this assurance from the government; one could not possibly obtain it from the record. But what the government really means, is that the informant was not proven to have participated in the

crime. And this failure of proof is quite a logical consequence of the fact that the government took sanctuary as to all facts relating to the informant.

Taking a shallow view of the defendant's contentions, the government very correctly states that "it remains a matter of conjecture whether the informant would materially illuminate the question of petitioner's knowledge." (Br. 53). Indeed it does; and that is a compelling reason why the conviction should not be allowed to stand. The defendant has been "conjectured" into a penitentiary sentence.

The government advises this Court that the defense requests for information concerning the informant, were made "without exception" in connection with the proceedings on the motions to suppress. The record will not support that assertion. In advance of trial, the defendant requested the identity of the informants, stating that it was "necessary to a proper defense" and that the defense desired to call the informants as witnesses if the government did not (R. 14).

The government further tells your Honor that the defense desire to obtain such information for a defense on the merits, was expressed in terms "too oblique and indefinite" to let the court know what was wanted. Examples of these "oblique and indefinite" requests are as follows:

> "Can we at least not have the date (on) when it took place so that Sam Rugendorf can defend himself?" (R. 24).

> "It would accord with fundamental fairness for us to know when it is this informant said he saw it, so I can account for the activities of Sam Rugendorf on the day the confidential informant says he saw it there." (R. 23).

"If (the informer) takes the stand it will demonstrate that Sam Rugendorf had nothing to do with it." (R. 14).

"We are entitled . . . to the names of the informants so that we may . . . seek out the informants ourselves and call them to the witness stand . . . ." (R. 14).

The government complains that in the Court of Appeals, petitioner first discussed this issue in his reply brief. But before that time, the point was never in issue. As previously observed, in its brief on appeal the government for the very first time contended that it was the nature of the proceeding, rather than the imminent death of the informer, which governed the defendant's right to this information. A shifting of ground clearly took place, but not on the part of the petitioner.

The rule, that on review a prosecution is rigidly bound to the theory on which the case was tried below, may fairly be regarded as monolithic. *Pearson* v. *United States,* 192 F.2d 681, 694, 6 Cir. 951; *Bollenbach* v. *United States,* 326 U.S. 607, 610, 614-615 cited with other authorities at *Wilson* v. *United States,* 250 F.2d 312, 325, 9 Cir. 1957. In the case at bar, a different ground has been asserted for sustaining petitioner's conviction, every time the government has written a brief.

The government also argues that information short of the identity of the informant would have been of no help to the petitioner, because he was never home in the day time except on Sunday (Br. 58). That argument actually presumes that the furs were seen by the informant during business hours, when petitioner was not there. And in any event, there is no reason why the petitioner should have been limited to learning only the date of the informer's visit.

In short, the government argues that the information sought by petitioner was properly denied him because: (a) the answer would have given him enough information to enable him to identify the informant, and (b) the answer would not have given him any helpful information, so that he was not prejudiced by the denial.

And, of course, the government forcefully contends that the defendant's presentation has not been consistent.

IV.

THE SUFFICIENCY OF THE EVIDENCE.

The government points out that the furs were found in petitioner's home, in one of several closets that opened off "a recreation room showing every evidence of regular use by the occupants." (Br. 59). If there was "every evidence" it is to be imagined that the government would be able to cite at least some of it. If by "the occupants" the government uses a term which is intended to embrace the petitioner, the record affords no basis for that assertion.

The government further argues that the actions of the thieves show that they did not believe that the petitioner "could be expected to call the police the moment he chanced upon the loot." (Br. 59) The government would apparently sustain the conviction by reason of the inferences which it draws as to the opinion of the thieves relative to the character of the petitioner. If the agents had desired to know whether the petitioner would have called the police on learning of the existence of the furs, they need only have made an anonymous telephone call to him to advise him that the furs were there, and then observe his actions.

The government argues that "both petitioner and Mrs. Rugendorf" were impeached by the contrary testimony of agent Lee on seven points (Br. 60, *Cf.* Br. 7-11). But of

the seven claims of impeachment, four relate only to the actions of petitioner's *wife*, at a time when petitioner was not present. As to the three points claimed to relate to the petitioner, two are at least very highly equivocal and have no relevance to the merits of the case.

The government obviously places principal reliance on the supposed impeachment of the petitioner relative to whether brother Leo had returned the residence key entrusted to him during petitioner's vacation.

The government originally argued that it was absurd to believe that Leo would have returned the key if he had placed the furs in petitioner's basement. It was "illogical", the government contended, to believe "that Leo would have placed the furs in the basement and then given away his only means of taking the furs out of the basement by returning the key to the defendant." (Gov't Br. in Court of Appeals, pp. 6 and 7).

As we observed in our petition for certiorari, a residence key can generally be copied at a price of 25¢. So the government now contends that Leo returned the key, and that, therefore, petitioner is "impeached on a key point in his story" (Br. 60).

From such supposed impeachment (by only one of many witnesses theoretically available to contradict petitioner on that point), the government draws a novel conclusion. It cites an opinion in a civil case as authority for the proposition that a witness may be so unconvincing as to persuade a jury that the truth lies in the *opposite* of his testimony (Br. 60, 61).

We do not question the validity of that principle in a civil case. But in a criminal case, the principle has no application whatever. A conviction can be sustained only on the strength of the prosecution, and not on the weakness

of the defense. *U. S.* v. *Bruno*, 153 F. 2d 843, 844, 3 Cir. 1946; *U. S.* v. *Laffman*, 152 F. 2d 393, 395, 3 Cir. 1945. It borders on the fantastic, that the government should argue that the conviction should be sustained because the jury might have believed that the truth lay in the opposite of the story told by the defense witnesses. There is absolutely no basis for such a speculation on the government's part. If there were, such assertion would be tantamount to a confession of error.

It is to be noted that the government did not even attempt to answer our contention that only *constructive* possession of the contraband had been shown. Instead, the government argues that the jury could infer actual possesion by disbelieving the defendant's disclaimer of knowledge.

Had that argument not been made, we would have regarded it as puerile, and an imposition on this court, to make a point so fundamental as that the burden of proof was on the prosecution and not on the defense.

But so stark a peril is posed by mechanistic attempts to justify freedom from judicial scrutiny in the employment of the confidential informant, that it here threatens the very presumption of innocence which is the bedrock of our criminal jurisprudence.

CONCLUSION.

There is no logical basis on which the result below can be sustained. We earnestly pray that the judgment be reversed.

Respectfully submitted,

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No. 223

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

SAMUEL JOSEPH RUGENDORF,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

Petition for Rehearing

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May It Please The Court:

With profound apologies to the court and to all who are affected by its decisions, we acknowledge that the opinion filed by your Honors on March 30, 1964 is very probably the product of the oral presentation on the part of the petitioner. In retrospect, it is clear to us that we did not discharge our duty to impart satisfactorily to your Honors an explanation of the issues, principles, and significance underlying this case.

Through our fault, there has evolved an opinion whose effect will be the practical nullification of the guarantees of the Fourth Amendment.

Implicit in your Honors' present decision are three propositions: First, that disclosure of the identity of a confidential informant can *never* be compelled in any proceeding in which a criminal defendant seeks to invalidate a search warrant by attempting to show that the informant did not exist, or was not known to be reliable, or is in fact nothing more than a euphemism for a wiretapper.

Secondly, this court now holds that in order to protect his rights under the Fourth Amendment, a defendant must somehow perform the impossible task of showing that the officer did not rely on an informant of past proven reliability, before he will be permitted to learn anything which might enable him to make such proof.

Third, and a lesson which will quickly be absorbed by police agencies: An officer who misconducts himself preliminary to a search, need only ask a fellow officer to make the affidavit for the warrant. In that way, he is immunized against the consequence of any falsehoods or misconduct. For the affiant will know only what his brother officer has told him, and, therefore, cannot possibly be shown to be lying. The officer guilty of the misconduct, on the other hand, is not the affiant, so that his lies are immaterial; and at any event, it is the burden of the defendant to take his chances by calling as his witness the very agent whom he accuses of lying in obtaining the warrant, even though that lie may have been established by extrinsic evidence.

The doctrines above stated are assuredly not spelled out within your Honors' opinion. Your Honors would recoil from any such direct expression. But those doctrines are

inescapably implicit within that decision. As previously stated, we regard this as the consequence of our own shortcomings in our presentation to this court. But we are hopeful that your Honors will not see fit to express the court's dissatisfaction with the presentation made by petitioner's counsel, by expressing a precedent which will weaken the effectiveness of basic constitutional guarantees.

In the hope of amelioration of this situation, we submit to your Honors the following points:

I.

THE SUPPRESSION OF THE EVIDENCE

The present opinion proceeds upon the premise that probable cause for the search warrant, is a totally discrete issue from the right of the defendant to compel disclosure of an informant's identity in a proceeding attacking that warrant. We readily concede—indeed, we urge—that this misconception of our position is the consequence of our own failing before your Honors. But we feel that we have misled your Honors into a position both illogical and dangerous. We would here attempt such rectification as is possible at this juncture.

As your Honors have here stated, this Court has never passed directly on the extent to which a warrant, valid on its face, may be subjected to extrinsic attack in an attempt to show that the probable cause appearing on the face of the warrant does not in fact exist. The opinion proposes to defer this issue.

But the opinion actually *decides* that issue in the most definitive manner possible. The opinion holds that *because* there was probable cause for the warrant, and because the petitioner did not show any *vital* falsehoods in the affidavit, petitioner was not entitled to the name of the informant in his attack upon the search warrant.

In effect, your Honors have held that because probable cause existed, the petitioner was not entitled to attempt a showing that probable cause did not exist. The conclusion, in short, is implicit in the premise.

But probable cause was "found" to exist in this case only by the police authorities. There was never a *judicial* check on that "finding."

With your Honors' indulgence, we would here attempt an analysis of what we believe to be the fundamental basis for the present opinion.

The heart of the issue:

ALL SEARCH WARRANTS ARE NOT ALIKE.

We believe that the fundamental issue in this case may well rest with the question posed by Mr. Justice Black on oral argument: Can a search warrant, valid on its face, be the subject of a judicial examination to determine whether its issuance was error?

We believe that much of the confusion beclouding this issue in the past, has resulted from a failure to distinguish between search warrants issued pursuant to true judicial inquiry, on the one hand, and search warrants issued ministerially, on the other.

And there *is* such a thing as a search warrant ministerially issued. Let there be no doubt of that. The search warrant in the case at bar is one of these.

The question of the availability of an attack on a presumptively valid search warrant, is debatable only because suppression of evidence is the judicial method of "punishing" the "constable [who] has blundered * * * [in order to] compel respect for the constitutional guarantee in the only effectively available way by removing the incentive

to disregard it". *Elkins* v. *United States*, 364 U.S. 206, 216-217, 4 L.Ed. 2d 1669, 1677. The corollary argument, frequently debated, is this: If a *jurist* issues an improvident search warrant, it is an obvious absurdity to speak of "punishing" the judiciary, or removing its "incentive to disregard" constitutional guarantees. Thus, the whole basis for the exclusionary rule can be argued to be nonexistent in such a case.

But this argument cannot be applied to *all* search warrants issued by a magistrate. In some warrant cases, a magistrate exercises a judicial function. In others, he does not.

Let us suppose that a witness comes to a policeman to complain of a crime. Two alternatives are available to the policeman, under the terms of your Honors' decision in this case.

First, the policeman may simply bring the witness before a magistrate, and stand by while the magistrate examines the witness. If the magistrate finds probable cause and issues a warrant, the policeman would then execute that warrant. We must concede that a warrant thus issued, if regular on its face, would not be susceptible to subsequent attack on a factual basis. The policeman would have performed only the classic ministerial function of his office. The determination of the complainant's reliability would have been made as a judicial act, by the magistrate.

But under the terms of your Honors' present decision in this case, the policeman has a second alternative. He can treat his witness as a "confidential informant." He can go before the magistrate and say only that he has an informant of demonstrated reliability. The determination of reliability, and thus of probable cause itself, is made by the policeman, not by the judiciary. Paraphrasing the oral

argument to your Honors by government counsel in this case, the policeman may say to the Commissioner:

> "I refuse to bring my confidential informant into this building because there are many security risks present, ranging from elevator operators to professional defense lawyers; and I refuse to tell you who he is because, Mr. Commissioner, I am frankly not too sure about you. If you refuse me a warrant, my suspicions will be confirmed, and I will thereby be required to treat as reliable any derogatory information that I may hereafter receive, Mr. Commissioner, concerning yourself."

This giant step on the road to a police state is no longer purely hypothetical. It is vividly real, in the light of the present decision.

But the point is, that in these circumstances, the magistrate serves a function analogous to that of a motor vehicle license examiner. The papers are in proper form, or they are not; but the *substance* is not a matter of his concern. In short, "No real judicial check [will] ever take place." *Costello* v. *United States*, 9 Cir., 298 F. 2d 99, 102. The judicial function is not performed in such a case, but is surrendered to the police officer. In such a case, we urge, a reasonable opportunity to challenge the police officer's determination concerning the reliability of his informant, is indispensable if the concept of separation of powers is to be observed. The exclusionary rule should properly apply.

II.

THE EFFECT OF THE FACTUAL INACCURACIES PROVEN BY PETITIONER

The majority holds that the factual inaccuracies proven by the petitioner "were of only peripheral relevancy to the showing of probable cause and, not being within the

personal knowledge of the affiant, did not go to the integrity of the affidavit."

We are most fearful that this language will have the unfortunate effect of encouraging policemen, in future cases, to tell their story to a brother officer and send him before the Commissioner, as was done here, rather than sign the affidavit personally. The inaccuracies (to use a charitable term) were those of a full-time credential-carrying government agent. The affiant himself could not possibly be "inaccurate" because he was merely repeating what his brother agent had told him. But surely, a false statement of a government agent, included within a government affidavit, is equally offensive whether the affidavit be signed by the agent with whom the false information originates, or whether it be signed by a brother agent on a hearsay basis. There is no logical distinction between the two. The "integrity of the affidavit" is non-existent in either case.

On the issue of relevance, we can only say that petitioner made as strong a showing of falsehood in the affidavit as any defendant will ever be able to make if he be denied all knowledge concerning the supposed informant. For in an ultimate sense, *everything* except the reliability of the informant is of "peripheral relevancy to the showing of probable cause."

The opinion suggests that the inaccuracies in the affidavit were not fully explored because *petitioner* did not call agent McCormick as a witness. But the petitioner made a prima facie showing that either agent McCormick had lied to the agent affiant, or the agent affiant had lied about what McCormick told him. Surely, in these circumstances it cannot be contended that the burden was on petitioner to call McCormick. If McCormick's evidence were rele-

vant, it would seem clear that it was the government's duty to obtain his evidence. It is hard to see why petitioner should be required to call as his witness, the very government agent whose truthfulness he has attacked, and for whose reliability he is obviously unwilling to vouch.

Petitioner made a prima facie showing. If any unfavorable inference is to be drawn, or any failure of duty found in the failure to obtain the evidence of McCormick, it is very clearly that of the government and not that of the petitioner.

III.

THE TRIAL RECORD

Conceding the imperfections of our trial record, this court has never, to our knowledge, insisted upon record perfection as a basis of either affirmance or reversal of a conviction. We would ask your Honors to remember that the ground used in the trial court for denial to the petitioner of information concerning the informant, was that such disclosure "would cause a possible murder." (R. 22). Objections on this ground were sustained repeatedly by the trial court, which ultimately flatly foreclosed all further questioning concerning the informant (R. 24).

In the face of such foreclosure, it is difficult to imagine how trial counsel can now be charged with waiving petitioner's rights by failing to pursue the matter further.

But at any event, the grounds upon which petitioner was denied information relating to the informant were equally valid in both the search warrant proceeding and the trial on the merits. The supposed "possible murder" was no more and no less likely whether the disclosure be made on the hearing or at the trial. The effect of the ruling was clearly not limited by reason of the nature of the hearing.

The issue of relevancy was never raised at the trial. We are hopeful that your Honors will not permit the government to prevail in this court on grounds so profoundly disparate from that which enabled them to prevail in the trial court.

The vice of such practice is obvious in the result here. The petitioner was denied relief in the trial court under circumstances which made it very clear that he had nothing to gain by reviving the issue ten minutes later at the trial itself, and that he was in fact foreclosed from doing so. In this Court, the government has prevailed because the defendant did not do that which the trial court expressly foreclosed him from doing.

We are prayerfully hopeful that your Honors will not permit such a result.

CONCLUSION.

Mindful of the many burdens upon this court, we pray that your Honors will nonetheless reconsider the present opinion, in view of the gravity of the issues there decided in view of the matters herein set forth.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 223.—October Term, 1963.

Samuel Joseph Rugendorf, Petitioner, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[March 30, 1964.]

Mr. Justice Clark delivered the opinion of the Court.

Following a trial by jury, petitioner was convicted of violating 18 U. S. C. § 2315 [1] by knowingly receiving, concealing and storing 81 stolen fur pieces, the fur pieces having been transported in interstate commerce and having a value exceeding $5,000. The Court of Appeals sustained the conviction despite petitioner's objections that the evidence was not sufficient to support the verdict; that the fur garments should have been excluded from evidence because they were seized on the authority of a search warrant supported by a deficient affidavit; and that the names of certain confidential informants referred to in the affidavit should have been disclosed. 316 F. 2d 589. We granted certiorari, 375 U. S. 812, and affirm the judgment.

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[1] 18 U. S. C. § 2315:

"Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of $500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken; . . .

. . . . . .

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

how the informants' testimony could help establish petitioner's innocence.

Nor do we believe that the trial court erred in refusing to have the Government disclose the exact date during the week preceding March 16 when the informant saw the furs in the petitioner's basement. It is difficult to see how that date could be useful to petitioner's defense, since the crucial date in the indictment was March 22 and there is no indication that the informant had any knowledge of any events occurring on that date. Petitioner's theory is that if he can find out the date, he may be able to show that he and his wife were away from home at the time when the informant saw the furs, thereby creating an inference that someone else let the informant in and that petitioner did not know of the furs. However, the particular date could not have been of material help to petitioner, as both he and his wife were away from home a major portion of nearly every day during the period in question.

IV.

As to the sufficiency of the evidence, it was undisputed that 81 stolen furs were found in the basement of petitioner's home. The furs were hanging in a closet along with a fur piece admittedly owned by Mrs. Rugendorf. Petitioner's defense was that the furs were placed in the closet without his knowledge while he and his wife were vacationing in Florida and that neither he nor his wife looked into the closet after their return until the officers

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tioner's counsel said: "Here is what Pierce [*sic*] says and here is what United States v. Roviera [*sic*] says: 'When it is demonstrated to the Court that it is essential to the defendant's rights, constitutional rights, that information be given to him so that he can test the validity of the affidavit,' then it must be given to him." Clearly his reliance on *Roviaro* for suppression purposes, which was the sole reason for which it was cited, was entirely misplaced.

executed the search warrant on March 22. Petitioner's brother Leo, petitioner's sister, his son and a neighbor all had keys to his house. Both petitioner and his wife pointed to Leo as the guilty party, but neither Leo nor the other relatives who had keys were called as witnesses. The neighbor, who was called to testify, denied putting the furs in the basement or permitting any other person to use the key.

As early as 1896 this Court dealt with such situations. In *Wilson* v. *United States*, 162 U. S. 613, Chief Justice Fuller held for a unanimous Court that "[p]ossession of the fruits of crime, recently after its commission, justifies the inference that the possession is guilty possession, and, though only prima facie evidence of guilt, may be of controlling weight unless explained by the circumstances or accounted for in some way consistent with innocence." At 619. Here, it was stipulated that 59 of the furs found in the petitioner's basement were stolen from a fur store in Mountain Brook, Alabama, on February 10, 1962. They were found in a closet opening off a regularly used recreation room. In the same closet was Mrs. Rugendorf's fur piece. Leo Rugendorf, petitioner's brother, was a known receiver of stolen goods and was seen at the home while the Rugendorfs were in Florida. Petitioner testified at trial that Leo had borrowed a key before petitioner went to Florida, and that Leo had not yet returned it. In rebuttal an FBI agent testified that petitioner told him that Leo returned the key soon after the petitioner returned from Florida. In some other respects the testimony of both petitioner and his wife conflicted with the rebuttal testimony of the FBI agents. Apparently the jury simply did not believe the explanation of petitioner and his wife. It may be that the jury's ~~credibility~~ credulity was stretched too far; or, perhaps the failure of the defense to call Leo Rugendorf and the other kinsmen, to

whom they had given keys to the home, appeared strange, especially so, since the neighbor was called to testify about his use of a key. In any event a prima facie case was made out by the stipulation and the presence of the furs in petitioner's home. We cannot say that this was insufficient.

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 223.—October Term, 1963.

Samuel Joseph Rugendorf, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[March 30, 1964.]

Mr. Justice Douglas, with whom The Chief Justice, Mr. Justice Brennan and Mr. Justice Goldberg concur, dissenting.

Just prior to the presentation by the prosecution of its first witness at the trial, counsel for petitioner requested the name or names of the informers mentioned in the search warrant:

> "Mr. Echeles: *Roviaro* v. *United States* [353 U. S. 53], which is cited by our Seventh Circuit as authority for this proposition, states that if the informants, if the names of the informants are necessary to a proper defense or a proper presentation of the defendant's case in attacking the search warrant, then in the interest of justice it must be given to the defendant. The government has no reason not to give it, said *Roviaro*, and that is the controlling law.
>
> "Let me demonstrate how in our opinion the names of the informants are necessary."

Counsel then went on to argue why disclosure of the informant's name was essential to his motion to suppress. Then he shifted to another attack stating:

> *"I would suggest that not only is this informant necessary to the defendant because if he takes the stand it will demonstrate that Sam Rugendorf had nothing to do with it*, or possibly his falsity, but I would suggest that perhaps he would be a pretty good witness for the Government, that they ought

I.

The search warrant under attack was issued by the United States Commissioner on the strength of an affidavit dated March 22, 1962, and signed by Marlin Moore, a Special Agent of the Federal Bureau of Investigation. The affidavit stated that Moore had reason to believe that approximately 80 fur stoles and jackets, taken in a burglary in Mountain Brook, Alabama, and worth about $40,000, were concealed in the basement of a single family residence at 3117 West Jarvis Avenue in Chicago.

Moore supported this allegation with statements that L. Dean Paarmann, a Special Agent of the Birmingham, Alabama Office of the FBI, informed Moore that on February 10, 1962, 82 mink, otter, and beaver stoles and jackets (but no full-length coats), worth approximately $42,044, were stolen in Mountain Brook, Alabama, and that on March 16, 1962, a confidential informant who had furnished reliable information in the past told Moore that during the previous week he saw approximately 75 to 80 mink, otter and beaver stoles and jackets (but no full-length coats) in the basement of the home of Samuel Rugendorf at 3117 West Jarvis Avenue, Chicago. The labels had been removed and the informant was told that the furs were stolen.

Moore further supported the allegation with the following statements: FBI Special Agent McCormick advised affiant that a confidential informant whom the FBI had found to be reliable told McCormick that Frank Schweihs of Chicago, and others, committed the Alabama robbery; McCormick told the affiant that on or about March 1, 1962, James Kelleher, a Chicago police officer, said to McCormick "that he saw FRANK SCHWEIHS at RUGGENDORF [*sic*] BROTHERS MEAT MARKET, managed by SAMUEL RUGGENDORF [*sic*] . . . ; further, Agent McCORMICK ad-

vised this affiant that another confidential informant who has furnished reliable information to the Federal Bureau of Investigation in the past told McCORMICK that LEO RUGGENDORF [*sic*] was a fence for FRANK SCHWEIHS; that SAMUEL RUGGENDORF [*sic*] was LEO RUGGENDORF'S [*sic*] brother and was associated in the meat business with his brother."

The affidavit also stated that another FBI Special Agent, J. J. Oitzinger, told the affiant that another confidential informant who had supplied the FBI with reliable information in the past advised Oitzinger that Frank Schweihs, Tony Panzica and Mike Condic were accomplished burglars who disposed of the proceeds of their burglaries through Leo Rugendorf.

Finally, the affidavit alleged that, upon checking the informant's description of the furs seen at 3117 West Jarvis Avenue, affiant found that the only reported burglary in the United States in the previous six months involving furs of that description and value was the one occurring at Mountain Brook, Alabama.

Pursuant to the search warrant based on this affidavit, a search was made and 81 furs were found in the basement of petitioner's residence. Fifty-nine of these furs had been stolen in Mountain Brook and the other 22, in Shreveport, Louisiana. Prior to trial, the trial court heard testimony on petitioner's motion, under Rule 41 (e) of the Federal Rules of Criminal Procedure,[2] to suppress the use of the seized furs as evidence. The trial court denied the motion insofar as it challenged the legal sufficiency

[2] Rule 41 (e) of the Federal Rules of Criminal Procedure:
"*Motion for Return of Property and to Suppress Evidence.* A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that . . . (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued . . . ."

of the affidavit, but reserved ruling on the truthfulness of the affidavit. During the trial, another hearing was held on the reserved aspect of the motion to suppress and the motion was denied. Also denied was a motion to require the Government to disclose the names of the confidential informants referred to in the affidavit.

II.

Petitioner attacks the validity of the search warrant. This Court has never passed directly on the extent to which a court may permit such examination when the search warrant is valid on its face and when the allegations of the underlying affidavit establish "probable cause"; however, assuming, for the purpose of this decision, that such attack may be made, we are of the opinion that the search warrant here is valid. Petitioner contends that probable cause did not exist because the only relevant recitations in the affidavit were the informant's statements that he saw the furs in petitioner's basement and that he was told that they were stolen. However, the informant's detailed description of the furs, including number and type, closely resembled Special Agent Paarmann's description of the furs stolen in Alabama. The affiant checked the burglary report records and found the Alabama burglary to be the only recent one in the United States involving furs of the description and number that the informant saw in petitioner's basement. In addition, the affidavit alleged that Leo and Samuel Rugendorf were brothers and that Leo was a fence for professional burglars. Although one of the informants who gave the latter information added, incorrectly, that Samuel Rugendorf was associated with Leo in the meat business,[3] there was direct information from another in-

[3] In fact, petitioner terminated his business association with his brother Leo and with Rugendorf Brothers Meat Market in 1952.

formant of the FBI that Leo was a fence, and nothing was shown to prove this untrue. The factual inaccuracies depended upon by petitioner to destroy probable cause—*i. e.*, the allegations in the affidavit that petitioner was the manager of Rugendorf Brothers Meat Market and that he was associated with his brother Leo in the meat business—were of only peripheral relevancy to the showing of probable cause, and, not being within the personal knowledge of the affiant, did not go to the integrity of the affidavit.

We believe that there was substantial basis for the Commissioner to conclude that stolen furs were probably in the petitioner's basement. No more is required. As we said in *Jones* v. *United States*, 362 U. S. 257, 271 (1960):

> "We conclude . . . that hearsay may be the basis for a warrant. We cannot say that there was so little basis for accepting the hearsay . . . that the Commissioner acted improperly. . . . He might have found the affidavit insufficient and withheld his warrant. But there was substantial basis for him to conclude that narcotics were probably present in the apartment, and that is sufficient."

Petitioner also contends that the withholding of the identity of the informant was a sufficient ground to require suppression of the evidence. But in *Jones*, *supra*, we said that "as hearsay alone does not render an affidavit insufficient, the Commissioner need not have required the informants . . . to be produced . . . so long as there was a substantial basis for crediting the hearsay." At 272. Petitioner's only challenges to the veracity of the affidavit are the two inaccurate facts mentioned above. Since the erroneous statements that petitioner was the manager of Rugendorf Brothers Meat Market and was

associated with Leo in the meat business were not those of the affiant,[4] they fail to show that the affiant was in bad faith or that he made any misrepresentations to the Commissioner in securing the warrant.

III.

Petitioner also asserts that he was entitled to the name of the informer in order to defend himself at trial on the merits. This claim was not properly raised in the trial court nor passed upon there, and, accordingly, must be denied here. On two occasions—once prior and the other during the trial—petitioner urged his motion to suppress the evidence as to the furs, contending that there were "factual errors" in the affidavit supporting the search warrant. It was solely in support of this motion—not on the merits—that petitioner requested the informants' names. This is made clear by petitioner's motion for new trial:

> "9. The court erred in overruling the defendant's motion for the government to reveal the names of the informers when such information was necessary to the constitutional rights of the defendant *in pursuing his motion to suppress the evidence.*" (Emphasis added.)

He relied entirely on suppression, which, if successful, would have ended the case. Failing in this petitioner asserted, for the first time, in his reply brief in the Court of Appeals that the name of the informant was vital both for the suppression hearing and for the

[4] The affidavit alleged that McCormick told the affiant that police officer Kelleher told him that petitioner was the manager of Rugendorf Brothers Meat Market and that a confidential informant told McCormick that Leo and petitioner were associated in the meat business. Kelleher testified that he did not so inform McCormick. The latter was in the hospital for an operation at the time of trial, but his deposition was not sought nor any postponement requested to enable him to be present.

defense at trial, because the informant alone knew whether he "participated with persons other than the defendant" in placing the furs in the basement. Apparently this was an attempt to bring the facts of the case within *Roviaro* v. *United States*, 353 U. S. 53 (1957), where the informant had played a direct and prominent part, as the sole participant with the accused, in the very offense for which the latter was convicted. But there was not even an intimation of such a situation at the trial here. The necessity for disclosure depends upon "the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." 353 U. S. 53, 62. Petitioner did not develop any such criteria with reference to the merits of the case. On the contrary, a careful examination of the whole record shows that he requested the informers' names only in his attack on the affidavit supporting the search warrant. Having failed to develop the criteria of *Roviaro* necessitating disclosure on the merits, we cannot say on this record that the name of the informant was necessary to his defense. All petitioner's demands for identification of the informants were made during the hearings on the motion to suppress and were related to that motion.[5] Never did petitioner's counsel indicate

[5] It was during the hearing on the motion prior to trial that petitioner cited *United States* v. *Pearce*, 275 F. 2d 318; *Giordenello* v. *United States*, 357 U. S. 480, and *Roviaro* v. *United States*, 357 U. S. 53. His counsel said: "That is, Giordinella [*sic*] states that the defendant has a right to have such hearing [on suppression]. Pierce [*sic*] and Roviera [*sic*] state we have a right in advance of the hearing to demand the names of the informers if the names are essential to the defense of the defendant *in the prosecution of his petition to suppress the evidence.*" (Emphasis supplied.) And on the second hearing when the Government offered the furs in evidence he again urged his motion, in the absence of the jury, introducing evidence showing the "factual errors" in the affidavit. On arguing the motion, peti-

not to want to hide the witness, that he would pretty much make out a case for the Government. (Italics added.)

"In any event, your Honor, I rely upon United States v. Pearce, 275 F. 2d, our Circuit. I rely upon Rôviaro v. United States, 357 U. S. 53. And I rely upon Giordenello v. United States, 357 U. S. 480, as being the proper procedure that I am trying to get here, your Honor."

It is impossible to say that this motion related wholly to quash the search warrant. It is true that *Pearce* and *Giordenello* involved such motions. But *Roviaro* did not. Rather it presented the same issue this case presents, *viz.*, whether the "informers privilege," 353 U. S., at 59, must give way in the interests of the defense of the accused.

The prosecutor objected, saying "that if the Government is to reveal the name of any informants they might and probably would be killed."

The trial judge denied the motion and the trial started. During the trial the request was repeated, counsel for petitioner saying "I need that information to defend my defendant, Your Honor." Whatever defect, if any, may have been present in his first motion did not appear this time. For now he was plainly addressing himself to the trial on the merits. Once again his request was denied.

It is obvious that these requests were made not only to challenge the sufficiency of the affidavit as a basis of the search warrant, but also for use on the issue of guilt or innocence—*viz.*, knowing possession of stolen goods. The issue was considered by the Court of Appeals,* 316 F. 2d 589, 592; and we should do the same.

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*The majority states that the demand for disclosure as it related to a defense on the merits "was not properly raised in the trial court nor passed upon there, and, accordingly, must be denied here." *Ante*, at —. But the trial excerpts reproduced above amply rebut

Petitioner and his wife were in Florida on vacation between February 17 and March 4, 1962. Before they left Chicago petitioner's brother Leo—an admitted "fence" for stolen goods—came to his house to see him:

> "Leo asked who was going to look after the mail, clean the sidewalks and everything else and he told Leo that his son Jerry would do it. Leo said that Jerry had to open the store every morning and stated that he got down a little later every day and so why not let him watch the house and bring in the mail. Accordingly, he gave his brother the keys.
>
> "From that day, on February 17, 1962, until this day [the time of the trial] he had not seen or talked to his brother Leo; nor had Leo returned the key."

Leo, the brother, had one key to the house during petitioner's absence. His sister, his son, and a neighbor also had keys. Since one of these was a known criminal, and since the informant had personally been in the basement of petitioner's home, the pertinency of the inquiry as to the informant's name becomes obvious.

Speaking of the "informer's privilege," we said in *Roviaro* v. *United States*, 353 U. S. 53, 59: "The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The priv-

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that contention as it relates to the trial. And the Court of Appeals expressly said:

"The remaining point raised by defendant as error is the refusal of the trial court to require the disclosure of the name of the informer. The defendant relies on *Roviaro* v. *United States*, 353 U. S. 53." 316 F. 2d 589, 592.

As already noted, *Roviaro* did not involve a challenge to the sufficiency of a search warrant. It presented the issue this case does. One requesting disclosure and citing *Roviaro* as authority obviously is seeking to bring himself within the situation to which the *Roviaro* rule is applicable.

ilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation."

But there are times when the privilege must give way. In *Roviaro,* we put one of those exceptions in these words: "Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action." *Id.,* at 60–61.

It is difficult to imagine a clearer case than the present one for application of that exception.

The Solicitor General seeks to avoid that conclusion by saying that even though the informant might disclose who stole the furs and how they reached the defendant's basement, "this would not necessarily have cast light upon the issue of petitioner's knowledge." The Solicitor General also argues that it is highly conjectural that identification of the person who admitted the informant to the basement would materially illuminate the question of petitioner's knowledge. We have, however, a case where the only proof implicating defendant was discovery of the stolen furs in his basement. Four keys to the house were in the hands of outsiders, one of whom had a criminal record for trafficking in stolen goods; the stolen furs may have reached defendant's basement during his absence and remained there without his knowledge. His only defense would be proof that someone without his knowledge put them there. Who that person was, when he placed the furs in the basement, what were his motivations in placing the furs there, what were his relations with the defendant, what connections did he have with the stolen articles—these questions go to the very